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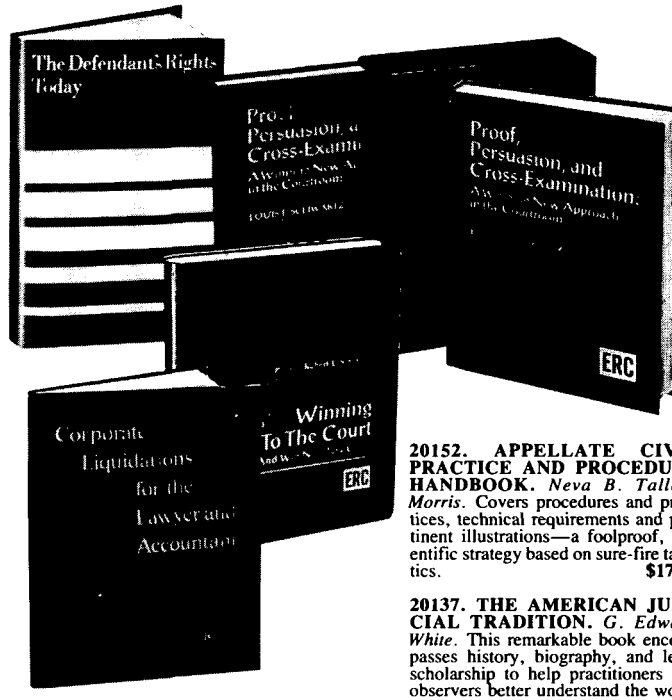

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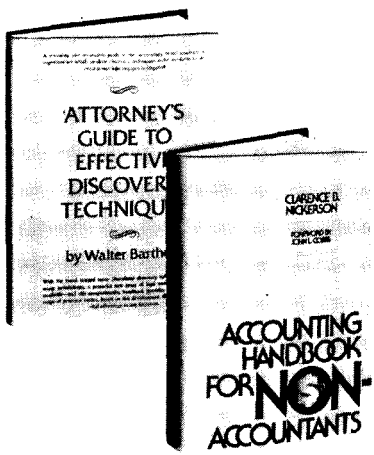

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How to Get a Job In the New Administration

by Nicholas Lemann

Despite all his grand statements about an unprecedented talent search, it was no surprise that Jimmy Carter, in his first few appointments, ignored America's vast residue of talent and its equally vast residue of hyperactive fortune-seekers and chose Jody Powell, then Thomas Lance, then Cyrus Vance. The first two showed that the best way to get a good job in the federal government is to have the new President know you or your work intimately, through being a long-time employee or a long-time advisor. Unless familiarity has bred contempt, there is no better way of getting the President's favorable notice.

Most of us, however, aren't holding those kinds of cards so getting a job in the new administration takes some considerable positive effort. For most people it requires careful maneuvering according to a time-honored set of rules, which begin with the assumption that if the new administration doesn't know you through personal experience, it had better get to know you through pure appearances. This is the Cyrus Vance route: you're accepted because you look so good.

Rule 1: *Attend as many conferences and conventions as possible over the years.*

When the transition staff starts calling around the country for suggestions about new appointees, you want your name to be mentioned often, and the way to ensure that is to meet important people in your field. All conventions—even the Teamsters and the American Legion—have this effect, but for aspiring federal officeholders, the Urban League or the Trilateral Commission or something of that ilk are the best way to make connections. Attending a prestigious conference on economic policy at Dartmouth last February may have put you in an even better position than the Carter worker who was earnestly ringing icy doorbells a few miles away at the same time. In fact, conference and convention attending as a means of getting one's name mentioned for all kinds of jobs, public and private, has become so endemic that one can legitimately wonder who is attending to the routine business if everyone in an official position is at Aspen.

Rule 2: *Attend to your* Who's Who *listing.*

When your old conference and convention friends mention you to the transition office's talent scouts—your name will "just keep popping up," as they'll put it—the scouts will have to write up a profile of you to pass on up the chain of command. Profile-writing is no fun, especially since the writers have their own jobs

Nicholas Lemann is an editor of The Washington Monthly.

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to hunt, so it's best to make it easy for them. Ideally you should be complete and up-to-date in *Who's Who*, the first place they'll look, with your qualifications apparent and your range of contacts impressive.

Similarly, it helps to publish articles in the right places, since they'll get your name and views known in the right circles and can provide handy reference material for profile-compilers. Everybody remembers that in the spring of 1960 Dean Rusk had a piece in *Foreign Affairs* called "The President," which advocated a strong foreign policy-making role for the chief executive—just what John Kennedy had in mind.

Rule 3: *Have a good fault.*

Since the talent scouts have to appear, at least to their superiors, to be subjecting you to vigorous scrutiny, they'll be sure to say to your friends something like, "You've told me what's good about him; now, what are his faults?" Your faults should obviously in no way interfere with your getting the job you want, so you should coach your friends in advance to say that you're someone who either "works too hard for his own good" or "doesn't know how good he really is." This latter fault is particularly good because it will make you seem ideal to an incoming Cabinet member who knows he isn't any good and so needs an assistant who *is* good but who thinks an assistantship is what he deserves.

Rule 4: *If you aren't in* Who's Who *and aren't known by people who are, work in the campaign early on and make sure your contribution is appreciated.*

American politics, presidential campaigns included, operate on the principle of benevolent feudalism: help a powerful figure and he'll take care of you. Thus after election day, following a brief panicked moment of uncertainty, a place was made on the transition staff for virtually everybody who had worked in the Carter campaign, regardless of his competence or whether there was anything for him to do.

Still, working in transition itself is only a foot in the door. It is heady, to be sure—coming to work every day one steps around a crowd of office-seekers that somehow has materialized out of thin air, as if to set the atmosphere. But even the noblest work can be rewarded only if it is noticed, so it's important that your selfless devotion to Jimmy Carter be visible and appreciated.

Whoever notices and appreciates you will become your patron, and since this is a feudal system, patrons control everything. The loftiest of patrons are the aides in Carter's inner

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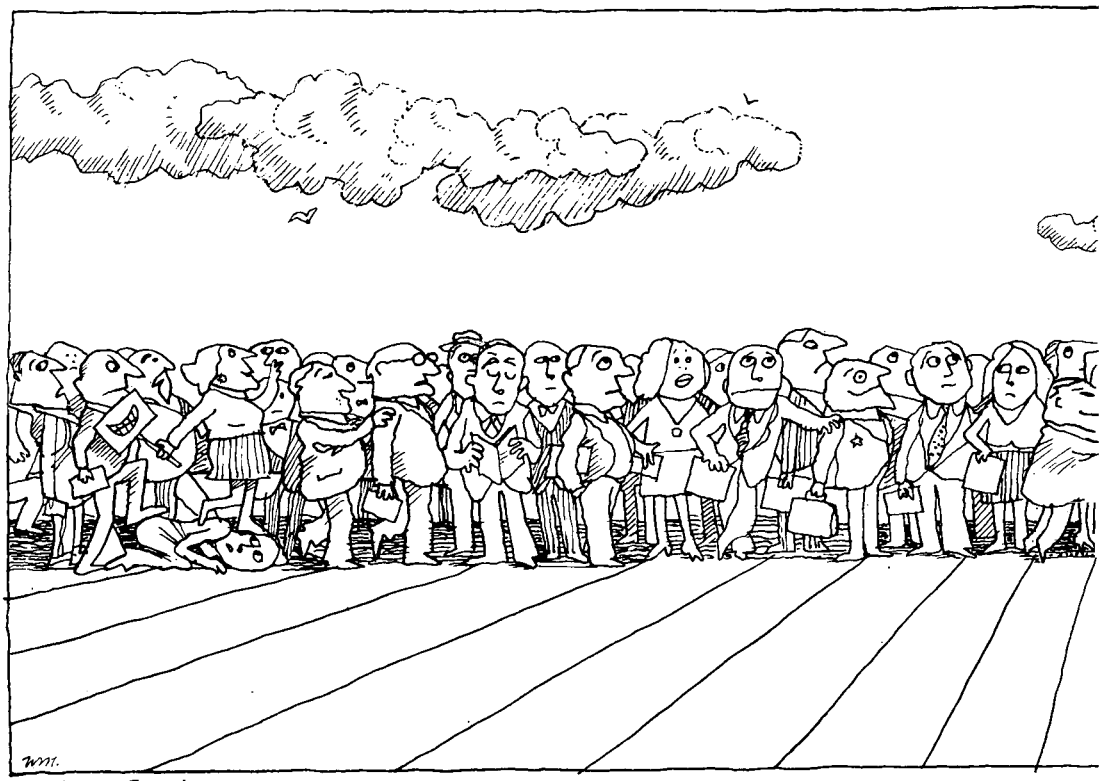

Wm. Sharon Farr, Jr.

circle—Hamilton Jordan, Jody Powell, Stuart Eizenstat. They can dispense dozens of jobs directly, and dozens more indirectly through a second tier of sub-patrons—Tim Kraft is an example—to whom it is also good to be attached. Without a patron, it's entirely possible to be forgotten.

Powerful as patronage is, people imagine it to be more so. Virtually everybody who works for Carter found in November that a lot of old friends were calling just to get back in touch, to see how things were going, to see if a lunch could be arranged. Even spouses of people who worked for Carter were besieged. Matthew Coffey, who runs the transition office's Talent Inventory Program, says he and his wife started crossing off their Christmas card list every old friend who called after election day to renew the acquaintance, and after a few weeks there wasn't much of a Christmas card list left.

Rule 5: *If you didn't get on board in time, have a friend who did.*

If you spent the first half of 1976 laboring tirelessly for Mo Udall, things are a little bleak now. But the situation would be brighter if you had kept open your ties to Leonard Woodcock, who came out for Carter early; he can get you seriously considered solely on his recommendation. The same goes for non-political friends who are likely to get Cabinet appointments and have patronage power of their own, or politicians with clout, like the senator on whose legislative support the new administration is counting.

Rule 6: *If you don't have a friend who got on board in time, have an enemy who did.*

Having a powerful political enemy in your hometown who is close to Carter may seem like the kiss of death, but actually it can save a flagging candidacy: if your enemy wants to get rid of you as a local rival, what better way than to find you something absorbing in Washington?

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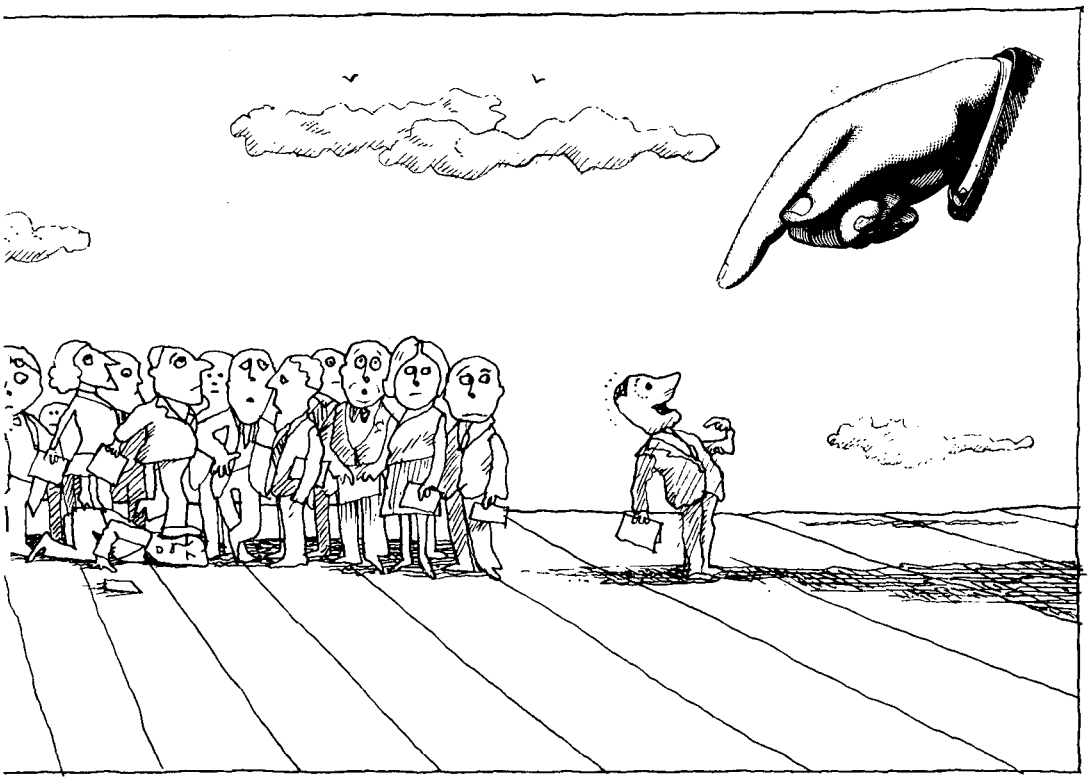

This rule deserves to be named after Bella Abzug, who appears to be its leading practitioner this year: Mayor Beame of New York, a respectably early Carter supporter, seems to be eager to get her appointed to something that will keep her out of local politics for a while.

Rule 7: *Follow the Redskins.*

Since job-hunting is an insecure process, and since everybody's always more insecure than he ought to be anyway, you'll spend a lot of time worrying about how to make sure your patron still remembers you. You don't want to be too obvious, come right out and ask for a job, because it might lead to a flat no—so you have to find subtler ways of staying in touch. It's good in this regard to develop a set of mutual interests with your patron, so that when he passes you in the hallway you can say, "Hey, Hamilton, how about those Redskins?" The general need for such safe, contact-establishing small talk no doubt accounts for much of the popularity of professional football in Washington. The State Department desk officer who Henry Kissinger walks past every day can't very well get the Secretary's attention by mentioning an interesting report on world food problems, but banter about quarterbacks might bring on that winning Kissinger smile.

Rule 8: *Hint that you expect to be named Secretary of Defense.*

For everyone, of course, there comes a time when small talk must pass and serious job entreaties are made. When this moment comes, if the job dispensers feel they owe you a favor, it's best to imply to them that you're expecting something *very big.* This will throw them into a state of worry and confusion—we just can't give him that, they'll think—so that when you come back a few days later and ask for an AID directorship in Costa Rica, they'll heave a sigh of relief and speed the appointment right through.

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Rule 9: *Hint that you expect to get $40,000 a year.*

Salary strategy works like job strategy: if you make it clear that in return for your efforts you expect a top-grade salary, you're more likely to get one. However, this can backfire. If you've created too strong an impression that it's $40,000 or nothing, you may well get nothing. So it's important also to make clear that you're sufficiently imbued with love of country to take something at $30,000, just so when the $40,000 jobs run out you aren't crossed off the lists.

Rule 10: *If you're young and have a lot of chips to cash in, ask for something on the White House staff.*

Nobody in his twenties or thirties, no matter how good, can get a Cabinet-level job—he's just too young. But a position of equal or even greater power in the White House inspires no such age barriers. The classic example is Bill Moyers, who in his early thirties was really the number-two man in the United States government as Lyndon Johnson's principal assistant. When Moyers tried to get Johnson to name him Undersecretary of State, Johnson refused, partly because of Moyers' age—a man that young couldn't, after all, be the titular number-two in a government department.

Rule 11: *If you're young and have some chips, but not enough to get on the White House staff, ask to be a special assistant to a Cabinet member or an agency director.*

Inside agencies and departments, the same rule against youth applies to jobs with imposing titles. But the special assistant to the director often has more access to the boss, and hence more power, than any division chief, and if he is artful and his boss thick enough, he can end up running the whole show.

Rule 12: *If you're not young, stay away from the White House.*

The real inner circles of the government are always full of people who work 16-hour days and sneer at those who don't. Older people should stick to the old, slow-paced agencies, where everybody but the janitors has left by 4:45 every afternoon. Commerce, Agriculture, and Interior are the safest bets.

Rule 13: *If you don't want to work at all, there are pleasant places for you.*

You may have a lot of outside interests to keep up on, or may want to avoid the ignominy of a lower-echelon, real-work job while your friends are amassing real power. In that case, perhaps the best thing is to look in the plumbook (the list of appointive job openings) for something obscure and soft—Executive Director of the Japan-United States Friendship Commission, maybe—and concentrate on other things. Campaign speechwriters, usually less than enamored of the idea of continuing to write speeches in the new administration, often follow this route. Under Kennedy, John Bartlow Martin became ambassador to the Dominican Republic, and William Attwood ambassador to Guinea; and Joseph Kraft started his column only after an assignment to Tunisia fell through.

Rule 14: *Once you're sure you have an in, try to look like an outsider.*

Here the general truths of federal job-seeking run up against the particular approach of Jimmy Carter. Once one could be an insider, and that was all one needed; now, one has to be an insider who looks a little outside, a politicker who seems to be serenely awaiting the call, an experienced hand who can appear to be new blood. When the list of the official transition

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staff of 132 people was published in the papers, virtually everybody had some sort of valuable past experience, but only eleven listed themselves as being from Washington, that not being quite right this year (and seven of those eleven were women, who have automatic outsider credentials.) Even a Washington mainstay like lawyer Simon Lazarus showed up on the transition list as a Cincinnati attorney.

For those not involved in transition, the best way to keep outsider credentials in good order is to keep the campaign for appointive office discreet, to appear innocent of cunning or influence-peddling. While publishing, for instance, is a key part of the campaign strategy, it has to be done subtly and early, giving way to reticence later on. *The New York Times* op-ed page, one of the prime conduits of visibility, was flooded with policy statements during most of 1976, but after election day the flow suddenly dried up.

Another reason outsider credentials help non-political types is that they make the political types look good. The former campaign workers who fill the transition office spend their time calling around the country to find possible candidates for jobs, and then writing short profiles of those candidates. If a transition worker wants to advance his own fortunes, he tries to discover people who, while eminently qualified, are not particularly well known—this proves his own talent-hunting acumen.

Rule 15: *Keep up on internal power struggles.*

Merely having a patron is of course not enough, since patrons can rise and fall—sure-thing appointments evaporate and key aides fall from grace. Like purge-fearing Russians, former Carter campaign workers are deeply affected by sudden, seemingly inexplicable shifts in the favor of their superiors. It is important to keep track of who is in and who is out.

No one, for instance, was sitting prettier in early November than a top assistant to Jack Watson, who, after all, was supposed to be *directing* the transition. But Watson had upset the seigniorial balance by allocating only four transition jobs to Jordan and two to Powell and trying to make Eizenstat some sort of assistant. The other patrons accordingly ganged up on Watson and divided the spoils more equitably among themselves, and Watson's power and patronage were severely reduced.

Watson's staff had no way of knowing that this was going on, and had to rely for their information on press reports, which treated Watson with a unanimous turnabout worthy of Peking wall posters. In early November he was Carter's fair-haired boy, but within a few weeks reporters were sniggering at his useless briefing books. The staff could only go along with what it read, so in-house banter shifted from we-had-to-do-it sympathy for poor deposed Jordan to sober reassessment of Watson's rapidly vanishing merits.

The internal struggles can be subtler and lower-level. The official transition list says Dr. Peter Bourne was the head of the Carter Washington office, but woe unto him who didn't know that Bourne was out and that Joseph Duffey, listed as associate issues director, was *really* head of the Washington office. And, because of the strange resolution of the Watson purge, Watson got to keep his budget and title but not his power, while Jordan's role in the transition vastly increased. Many paid Watson underlings were out while unpaid Jordan underlings were in. For a while there were actually two transition teams working on staffing for some departments—one official, paid, unimportant Watson team and one unofficial, unpaid, very important Jordan team.

Since it's impossible to have any effect on a patron's fortunes, the best policy besides vigilance is to have more than one patron and to be ready to jump ship at any time. Putting all your eggs in one basket could leave

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you in a position embarrassingly similar to that of the crowds outside the doors: one man who worked a year for Powell and was cut loose in November was reduced to hanging around the transition office, hoping somebody else would remember him and take him in.

But the patron system has its benign side too, and if it can lead to precipitous falls it can bring about quick rises as well. For people who worked in the campaign, it's a familiar experience to pick up the paper and see some once-minor functionary who came aboard in September described in a headline like KEY CARTER AIDE HEADS STUDY GROUP. One member of the transition staff says it's like living in a World War II movie—whole platoons wiped out, battlefield commissions granted, people either cracking or shining under the strain.

Rule 16: *If you have to, become obvious.*

As the hour of hiring draws near and things look less than certain, direct—though discreet—action can be taken. One approach is to pass your name around to people you're certain the transition office will call, to make sure you'll be mentioned. Here again conference attendance is a blessing, since you can write, say, a member of Carter's team of economic advisors reminding him of your pleasant discussions in the past and saying, frankly, that you'd be willing to go into the government if the call came. Letters can be followed by phone calls, and the closer the acquaintance, the more direct the entreaty can be.

Even handing in a resume, although obvious, can help, especially if it is written in a way that implies special skills and unusual experiences (this can be tricky, though; one wants to hint at one's early opposition to the Vietnam war, but not so strongly that someone along the line who was still a supporter of the war in 1972 would want to veto you).

However, letters and resumes can be filed and phone calls finessed, so if all else fails, the rules allow you to just show up in Washington, impossible to ignore. You set up shop in a hotel room and call whoever is granting the job you want, saying something like, "I just happen to be in town for a couple of days, and I wonder if I could drop by and say hello." James Lynn, President Ford's director of the Office of Management and Budget, used this gambit with great success in 1968, when he arrived at the Hotel Pierre in New York and announced to the transition staff, which was headquartered there, that he was ready to serve. Showing up works best in conjunction with a powerful figure who can call transition headquarters himself and announce that you're in town for a couple of days and that he'd like to bring you by. In person, you become much harder to brush off.

Rule 17: *No matter how down you may get, you're never out.*

Things can get pretty bleak if the job-hunting process is botched, but even then, if your talents are at all familiar to the new administration, all is not lost. Someone who made an egregious tactical error somewhere along the line, like Jack Watson, will be rehabilitated eventually—after the first round of sure-thing appointments, those doing the appointing are forced to deal with unknown quantities, and anyone known can then make a comeback. Even someone with hardly any chips at all can, with patience, find his way in, because as the administration wears on it becomes harder and harder to lure people aboard. Anybody whose desire to enter the government fails to burn lower with time can find a respectable place at the end of an administration, a place that, in fact, has a higher prestige-to-work ratio than its early-on equivalent. Perhaps the loser who waits around for something like that is better off anyway, having saved himself a lot of hustle. ■

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How Carter Can Find Out What The Government Is Doing

by Charles Peters

As soon as Jimmy Carter was elected, he announced that the members of his new Cabinet would be powerful men once again. At his press conference on November 3 he said, "I would choose Secretaries of Agriculture, the Treasury, of Defense, HEW, HUD, and others who are completely competent to run their own departments. I would not try to run those departments from the White House. The White House staff would be serving in a staff capacity—not in an administrative capacity."

Carter made another gesture in the same direction a few weeks later, when he said that he enjoyed a new book by Stephen Hess, a former assistant in the Nixon White House who now works at the Brookings Institution. The book, called *Organizing the Presidency*, was a sort of emancipation proclamation for the oppressed masses of the Cabinet; it said, in essence, that the President should confine himself to deciding the big questions of public policy and—with the exception of foreign crises—leave the details of performance and execution to the people who run his departments.

Certainly there is virtue in delegating authority; it takes just a brief stroll down the memory lane of the Nixon years to remember why. But there is a serious danger too, namely that in its enthusiastic embrace of this new mistress, the Carter Administration may forget the plain-but-virtuous sweetheart who got Carter elected in the first place.

Charles Peters is editor-in-chief of The Washington Monthly.

When Carter faced all those Udalls and Jacksons in the Democratic primaries, it was not stark differences of ideology that enabled him to prevail; rather, it was his emphasis on the way the government *performed*. Alone among the candidates, Carter gave a sign of understanding how it felt to be on the receiving end of government—to stand at that place at the end of the funnel where the brilliance of overarching conceptions is difficult to perceive, so thick is the fog of incompetence, foolishness, and waste. By the time he faced down Gerald Ford, Carter had to fight with more of the traditional Democratic weapons, but if he had not shown that he could do more than Spend, Spend, Spend, he would certainly have lost.

That is part of Carter's promise—to have a government that works again. Yet if he follows Hess' recommendations, he will never see it fulfilled. Simply delegating authority to the Cabinet, while hoping that performance will take care of itself, will only aggravate the problems of ineffectiveness and waste that so many voters are counting on Carter to correct.

Other Presidents have walked this road and discovered the same thing before. In *Before the Fall*, William Safire says that Richard Nixon, in his too brief impersonation of Disraeli, was intent on giving his Cabinet real authority to run an efficient govern-

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ment:

"Nixon was determined to give his Cabinet members . . . much more of a say in running the government. He was sincere in this; it fit neatly into his basic idea of command structure, with decentralized authority. . . . [H. R. Haldeman] studied the recommendations of management consultants and agreed that staff-power decentralization should be the theme. . . . This was an article of faith with Nixon, whose generation of Republicans were brought up to denounce the swollen White House staffs of the FDR days—the 'janissariat'—and who matured in the staff system of the Eisenhower years, with Treasury Secretary George Humphrey effectively running the country and Secretary of State John Foster Dulles running the 'free world.' "

But it didn't work. It won't work for Carter, either, however much his character may glisten compared to Nixon's. Two obstacles stand in his way, and unless he removes them, decentralization will do nothing to improve the government's performance.

The first problem is that the departments, as presently organized, are hardly the ideal vehicles for smooth, efficient administration. Some day Carter's people may have the duplication and overlap eliminated; that is what his reorganization teams are working on right now. Through the miracle of modern science he may even change the administrative structure within the departments, so that Secretaries can exercise genuine control over the people who sit below them on the organization charts. But such happy changes will be at least a year or two in coming, and until then Carter must continue to hold the reins, direct from the White House.

There will be no rest for the weary at this point, however, for a second obstacle will remain. Even in the most perfectly reorganized Department of Commerce or State, even with the most dedicated and scrupulous Secretaries, the basic rules of organizational life will mean that the departments and their Secretaries will almost never want to give the President what he almost always needs.

This President's interest lies in performance; four years from now, he must be able to show that his government has done the job. In the interest of improving performance, he needs to hear the good news and the bad news, to find out about the successes and the failures, the heroes and the goats. He may want to create this new agency and abolish that old one. He will, theoretically, be willing to rearrange and change and hire and fire, as experience and judgment show best.

The departments' interests will never be the same as that. Locked deep in the nucleus of each department and civil servant, determining behavior as reliably as DNA, is the double-helix of Survival. A civil servant may be honestly concerned about the government's power and performance, but concern only goes so far. The *real* hierarchy of values—the impulses that cannot be ignored—are likely to go like this: most important is his own survival in his job; second, survival of the subdivision or program of which his job is part; third, survival of his department; and fourth, for the handful of political appointees at the

'The President has a CIA to tell him what's happening in Poland, but no one to tell him what's up at HEW.'

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'Other Presidents have discovered the dangers of decentralization. Richard Nixon, in his too brief impersonation of Disraeli, was intent on giving his Cabinet real authority—but it didn't work.'

top of each department, survival of the Administration in the next election.

Who can sneer at these interests? Most people have similar ones in their own jobs. The danger is that they combine to push in an unhealthy direction. The President's desire for high performance will often conflict with the departments' desire to survive. And when it does, the departments will prevail unless the President has taken unusual steps to see that his programs are run the way he wants them run.

The one place where this conflict of aims is most likely to occur, and where it is most dangerous, is the transmission of reports about how well the government is performing. A transmission system of sorts now exists, of course. Program officers tell bureau heads, bureau heads tell Secretaries, Secretaries tell the President. But at each stage in this process—how can this be a surprise?—the laws of human nature come into play. Those whose career and identity are bound up with a program or department are unenthusiastic about passing on information that makes them look bad. Sometimes they do, but the odds are all against it. The pressure runs right to the very top: each Secretary is the Secretary *of* a certain department, and anything that diminishes the honor and respect of his organization inevitably diminishes him as well. The pressure runs, in fact, even beyond the top: it runs to the President, for when he reports to the nation about the results of his stewardship, he, too, will emphasize the brighter side.

The predicament comes down to this: no President can rely on his appointees to transmit accurate information about how well the government is doing. Now and then he'll hear dour reports, but those who bring them will most often be angling to take over an agency by impugning its current management. (So, when Carter reduces inter-agency warfare by eliminating overlap, he will take away even this incentive to the bearers of bad news.) He has a CIA to tell him what's happening in Poland but no one to tell him what's up at HEW. And so the President limps along without reliable information. He may be surprised when a big housing scandal is reported in the newspapers. He may be frustrated when his orders for a more efficient welfare system seem to vanish in the haze. Depending on his literary taste at the moment, he may recall Bunyan's Slough of Despond or Vonnegut's "so it goes."

Or he may recall that Nixon found one very effective way to cope with this frustration. He had Haldeman cram each department with spies who functioned as extensions of the White House. Carter deplores that abuse, but three years from now he may have a little more sympathy for the frustration that drove Nixon to such lengths.

There is one other way out for Carter, one way to delegate authority without hiring a Haldeman of his own. It is to be sure that he is getting information from someone other than the Secretaries. The answer is to create an independent system that will report the facts to him.

Other leaders in other ages have made symbolic steps in this direction.

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John Kennedy used to phone up lowly members of the bureaucracy to find out what they thought. Franklin Roosevelt sent Eleanor into the hinterlands. As governor of Georgia, Jimmy Carter used to visit the offices of the state government and ask advice from people he would otherwise never have seen. All that is fine. But it cannot take the place of systematic, impartial reporting from people who work not for any department but for the President and his staff.

As President, Carter needs an independent reporting group on his White House staff. It might mean putting a few more people on the payroll, but it would also mean he could transfer real authority to the departments without having to scramble to recover it later on. Carter does not want a White House janissariat; he can avoid it if he has a reporting staff.

In choosing the people to do this, he should bear two qualifications in mind.

First are the skills. The President needs people who can go out and inspect government programs at the delivery end. Their inquiries should not be those of either a newspaperman or an academic, but rather a combination of the best of both. The newspaperman is happy when he gets the facts straight, the scholar sometimes forgets to get the facts at all, while one of the President's reporters should be able to give him both—facts and interpretation, detail and analysis, forest and trees. And when it is over, they should not inter their findings in jargon, but write them up in a form the President and his assistants will want to read.

The second qualification concerns their attitudes: they must not be careerists. They should not hope to hold this job—or any other in the government—for very long. When inspecting a program, they must be immune from the desire to take the program over. They should not even want to stay for the whole course of the Administration, for if their career interests lie elsewhere than the White House they will be better able to cope with the subtler predicaments of life there.

'Locked deep in the nucleus of each department and civil servant, determining behavior as reliably as DNA, is the double-helix of Survival.'

In theory, any President wants to hear it all—the good news and the bad. He knows that is what he must hear. He will tell his assistants so. Everyone will believe it—in theory.

But there will come times when the President, like any human being, will get tired. Congress will be rebellious, the Rhodesians will be restless, and Amy will be in trouble at school. At just that moment, Carter will not be dying to hear about the latest flop in crime control. If his assistants hope to be eight-year men in the White House, they will learn when to lay off. They will learn to spare him the bad news when he wants to be spared.

To some extent such tact is a godsend. But there can be such a thing as too much consideration. The President can let himself be misled, unless he takes steps beforehand to see that he keeps getting all the news, even when he doesn't want it—just as he must schedule regular bouts of physical exercise. It will be harder to put off the PE instructor if he has a 7:30 appointment each moring, and it will be harder to ignore the bad news if he hires people to bring it. The same

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people—and the PE teacher too—will keep coming, despite the President's moods and favor, if their careers and hopes are not wholly bound up in his pleasure.

Hiring such a temporary staff is more troublesome than appointing Secretaries and special assistants who will stay for the duration, but there are ways to do it. At the Peace Corps—the one branch of the government that had a reporting staff during the 1960s—the main source of talent was journalists, hired on a free-lance basis. Journalists need have no monopoly on the field; the reporters could also be lawyers, economists, academics, or anyone else with the skills and the cast of mind for the job. The main requirement is that they be *something* other than career civil servants.

This is not such a modest proposal. It will be tricky to set up and it will sit ill with the Secretaries. It may sit ill with many in the White House, too, for some of their grand ideas will turn to dross when enacted.

In fact, Carter doesn't need to bother with it at all. He can just delegate authority, wait two years, and then pull out Bob Haldeman's blueprints from some dusty closet at the White House and figure out how to grab hold of the departments once again. ■

Answers to the December puzzle:

we bring them all together

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Tidbits and Outrages

In Droves

You've heard a lot recently about how underpaid our top civil servants are. You probably assume they're resigning in droves to accept eager offers from private business. Not so. Over the last five years resignations for the entire civil service have run between seven and eight per cent. For the top group of civil servants, called supergrades, the figure has been between six tenths of one per cent and 1.4 per cent.

The Good Life in Government

People who dream of having soft jobs often say they want to work in "personnel." The government of the District of Columbia has satisfied the longings of 700 such people. It now has a ratio of one personnel officer to every 46 employees. For comparison's sake, Jacksonville has one to 123 and San Francisco one to 136.

Getting Tough With White-Collar Crime

The General Accounting Office, God bless it, has come up with another little scandal that illustrates the way the bureaucratic mind works. Here is the story, as reported by John Goshko in *The Washington Post*:

"During 1973 and 1974 the Internal Revenue Service ignored its own rules by singling out middle-income taxpayers for a lopsided share of audit scrutiny, according to a government report made public yesterday. The report by the General Accounting Office, Congress' watchdog on government operations, found that the IRS practice in 1973 and 1974 ran counter to the agency's official policy calling for the use of audits to ensure tax compliance by all categories of taxpayers. Under this policy, any shifts in auditing emphasis are supposed to be directed against groups with low compliance records.

"Yet, the GAO report noted, middle-income taxpayers historically have the best record of paying their federal income taxes voluntarily, promptly, and honestly. The IRS action, the GAO study said, resulted from the agency's attempts to justify a request to Congress for more auditors. It promised to use the additional personnel to increase the number of audits performed during the 1974 fiscal year.

"To meet this commitment, the report continued, the IRS then directed its staff members to increase their audits of middle-income returns. That was done, the report said, because middle-income audits usually can be accomplished quickly and help to boost the statistics of jobs completed."

Good Company

In our early years, we were pretty much alone among publications in our interest in the subject we called "the culture of bureaucracy." But we've got a lot of company now, some of it quite good. One example is a recent article by Leonard Reed on the op-ed page of *The Washington Post*. Here are some of the things Reed had to say:

"People who choose government as a career are at least as competent, industrious and resourceful as those who go into the business world. But it is hard as last week's rye toast to fire anyone in government, so to a greater extent than in private industry, the incompetents hang on to their government jobs.

"Notwithstanding the periodic pronouncements of 'salary commissions,' it is a myth that bureaucrats are underpaid. The bureaucrats who promote the myth do so on the basis of what they hold up to be comparable executive positions in government and industry. But while the upper-echelon line executive at Western Electric makes choices and decisions that put his job on the line, depending on whether the result is an increase or decrease in profitability, the HEW

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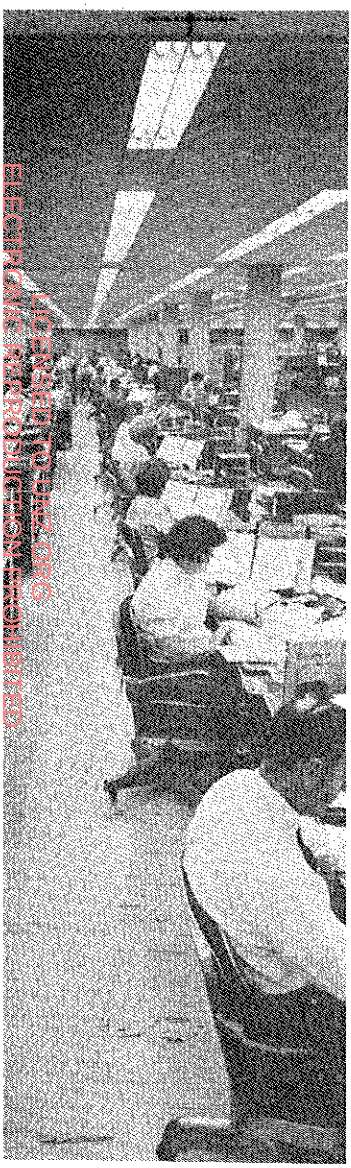

upper-echelon line executive makes his decisions in perfect safety: He doesn't deal in a measurable commodity, and no one will really know whether his decision was good or bad. Further down the scale, the average GS-15 has less responsibility and a far higher salary than the manager of your local supermarket.

"Salary comparisons with industry are made on the basis of 'job descriptions.' Anybody who has ever worked in a government agency knows that job descriptions will endow a file clerk with responsibilities before which a graduate of the Harvard Business School would quail. It is true, however, that in certain glamour fields, private industry pays far more than government, and it is also true that too many top corporate executives receive shamefully high remuneration with which government does not and should not compete.

"The bureaucrat who works 80 hours a week . . . does not exist. Many government executives do work more than 40 hours a week without additional pay. Their number, however, is not legion, and their motivation is frequently an overdeveloped instinct for self-advancement or the common American addiction to work as a flight from awareness of one's own insignificance. Most bureaucrats don't work a minute over their allotted time and, if they do, are paid overtime or receive compensatory time off.

"No activity in a government agency is given as high a priority as securing and enlarging its budget. . . . Bureaucrats almost invariably believe in the function their agency exists to perform, whether it is providing information to farmers or preserving the national forests. A new bureaucracy, the darling of the administration that establishes it, has a missionary zeal about its function. As a bureaucracy ages, it loses glamour and finds itself expending an increasing share of its energy on obtaining funds from a Congress faced with many competing claims, and expending correspondingly less energy on its original function.

"Gradually a hierarchy of administrative officers, executive officers, budget officers, congressional liaison officers and public information officers grows up, almost the sole purpose of which is fund-wheedling. Since there is a certain logic to the proposition that without money an agency can't function, the bureaucrat. . . finds nothing wrong with spending more and more of his time and attention aiding the quest for more money (much of which is now needed to support the large money-raising apparatus that has grown up in the agency)."

Ts & Os

Man Bites Dog

Some years ago we published an article called "Stories Reporters Don't Write." Equally fascinating are the stories they do write. Take the story of Joseph Yeldell. He has for several years administered the District of Columbia's Department of Human Resources with unswerving incompetence. But he did not get banner headlines until he was accused of nepotism. That's a legitmate investigative story. Every newpaperman knows that. Incompetent administration on the other hand is not a legitimate story, yet it's the story we should get from the press. What do we care if every official hires his mother, father, sister, brother, son, daughter, and spouse, if they all do a good job? The challenge to the press is to find out what they're doing, but nepotism is easier to report. The irony is that nepotism should be the last thing to shake Washington. The civil service, which means most of Washington, is in fact an extended family of friends, who frequently take care of one another's relatives, on the basis of you hire mine and I'll hire yours.

Watergate Went Further Than You Think

The Washington Star chose to bury this report by Jeremiah O'Leary in its inside pages. We found it interesting:

"Denver—Two months before President Nixon resigned, his White House chief of staff, Gen. Alexander Haig, reportedly ordered the Army's Criminal Investigation Command to conduct a secret investigation of any Nixon connections with huge cash contributions from countries in the Far East.

"The Haig investigation of Nixon in June 1974 was disclosed by Russell L. Bintliff of Denver, now a civilian but then an Army warrant officer and special agent of the CIC at Ft. McNair in Washington. . . . Bintliff said he was ordered to conduct his investigation by Col. Henry H. Tufts, the CIC commander and now retired.

" 'I was in the Special Actions Division at old Tempo B on the Ft. McNair base when the colonel called me into his office,' Bintliff said. 'He told me Gen. Haig had just left.

And he said Haig wanted some things checked out on the President.

" 'It involved Caulfield and Ulasewicz' (John J. Caulfield and Anthony T. Ulasewicz, the two former New York policemen who were hired for special assignments by John Ehrlichman in the spring of 1969 and became the first of the White House 'plumbers').

"Bintliff said he also was aware of the unverified reports that South Vietnamese President Thieu and Air Marshal Cao Ky had sent several millions of dollars to the United States for Nixon's political campaign activities.

" 'I never could find that Caulfield and Ulasewicz had gone to the Far East, but in my verbal reports to Col. Tufts I pointed out that in those days an American didn't need a passport to get into Vietnam. You could get on a military plane and go in and out without any of the normal State Department travel documents.

" 'I concluded that they probably had gone to Vietnam. . . .' "

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What's Wrong With The Adversary System: Paranoia, Hatred, and Suspicion

by Anne Strick

"Adversary system" is likely to be one of the first phrases heard by anyone who, willing or nilling, tangles with our courts. When, in your attorney's office, you either express dismay at the brutality of the initial blow struck by the other side or express shock at the brutality of the blow your side is about to strike, your attorney will say, "Well, you see, we have an adversary system of law. . . ."

What is this "adversary system?"

It is a method of dispute settlement that requires all persons who go to law to settle differences to behave as enemies. They must fight—generally the harder, the better.

Out of that battle, adversary rationale maintains that the truth will be revealed. This is sometimes called the fighting theory of justice, and it underlies both the conceptual framework and the procedure of our law. Each side must present *not* all it knows, but only its own "best case"; must assail the opposition; must attack and counterattack, "discover" and avoid discovery.

Nearly all members of our legal profession hold this adversary method to be desirable—in truth admirable, a very jewel among the world's judicial systems. Yet there is little evidence that either its sources or its claims, its underlying assumptions or its implications, have been much examined. Ever.

For example: The University of Southern California law library holds over 125,000 volumes (as of March 1976). Of these, not one book is devoted to the adversary system of law, its genesis, evolution, rationale, and criticism. The UCLA law library holds over 248,646 volumes. Not one of them is devoted to a consideration

Anne Strick is a California writer. This article, appearing here by arrangement with Juris Doctor, *is from her book,* Injustice For All, *to be published by G. P. Putnam's and Sons.* *Copyright ©1977 by Anne Strick.*

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of the adversary system. The Los Angeles County law library, with its eight branches the largest public law library in the country, holds over a half-million volumes. Not one is devoted to the adversary system.

At UCLA, eleven texts are required or suggested for first-year law students. Nine of these texts make no mention of "adversary system" in either chapter heading or index. Two do: *Criminal Law and Its Processes,* by Kadish and Paulsen, discusses "adversary system" in one-and-a-half pages out of 1,415.

Civil Procedure, Cases and Materials, by Cound, Friedenthal, and Miller, contains two pages in which "adversary system" is touched upon, in a book of 1,048 pages. And yet, according to the authors in their opening chapter, "A distinctive element of the procedure for resolving legal controversies is the adversary system. This element is indeed central to the whole subject, and unless it is understood it becomes well nigh impossible to explain, much less to justify, most of our procedural law." In three more paragraphs they are done with it.

I believe that our adversary legal system is one of the major taken-for-granted, practically-never-questioned institutions of our culture. More, I believe it is an anachronism, a relic of a primitive way of seeing and thinking about the world. Indeed, our commitment to the adversary approach demands that we refuse much of the best knowledge and behavior of our twentieth century, and go backward—centuries back, to ordeal and to magic. For it is from the customs of judicial ordeal and magic that our legal style in large part derives.

There are dozens (at least) of books written by attorneys for each other, instructing how to win a battle. In them, terms of weaponry, of injury, and of extermination appear with notable frequency:

"By our manner toward a witness we may have in a measure *disarmed* him. . . but it is only with the matter of our cross-examination that we can hope to *destroy* him."

". . . to *demolish* the effectiveness of the key witness. . . ."

". . . by *annihilating* the key witness. . . ."

". . . the. . . double-edged *sword* —cross-examination."

"Cross-examination is the most *potent weapon* known. . . ."

"To *destroy* the witness it is necessary to. . . ."

". . . it is best to *attack* indirectly. . . ."

This behavior another lawyer has termed "trial by *ambush* and trial by surprise. . . ."

In *The Art of the Trial*, Norbert Savay puts it plainly: "A student of the art of advocacy and of the legal contest can profit immensely by a deep and protracted study of war strategy. . . ." He adds, "In the original meaning of the word, 'strategy' is the art of planning a military campaign with a view of achieving a termination of war in one's favor. . . . Our definition of legal strategy is identical with that of military strategy. So, too, is our conception of many of the basic principles underlying each. . . ." For example, quoting *Science of War*, Savay elucidates, ". . . The trained strategist bends all the powers of his intellect and the resources of his knowledge to deceive, to surprise, to overwhelm. . . a military commander. . . falls upon the hostile army. . . and makes an effort to annihilate it."

Small wonder that Judge Learned Hand was moved to comment that ". . . as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."

Cross-examination—examination at the hands of the opposing attorney—is the concentrated essence of adversary behavior. It is also the unique pride of the legal profession. Called a necessary art aimed at trapping the unwilling or

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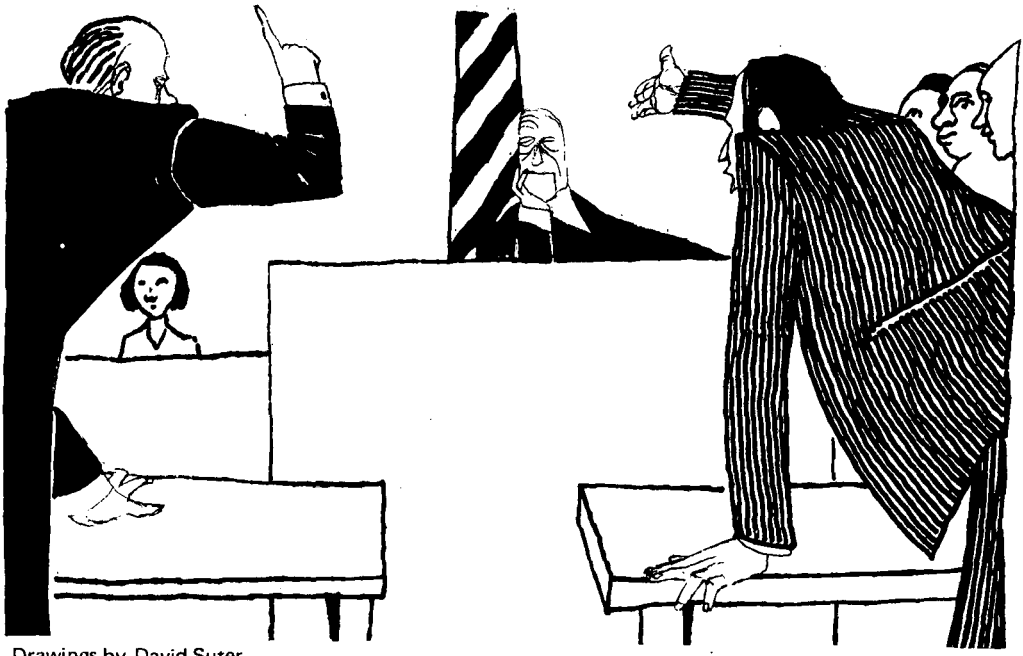

Drawings by David Suter

dishonest witness, cross-examination theoretically reveals material hidden or undeveloped under prior direct examination by the witness' own attorney. That material may be either "qualifying circumstances of the subject of testimony" or "facts which diminish and impeach the personal trustworthiness of the witness."

An authority on evidence elaborates: the witness' ". . . motives, his inclinations and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor and of determining the just weight and value of his testimony."

Cross-examination also has specifically tactical goals. These include obtaining helpful and discrediting harmful testimony; discrediting the witness; laying a foundation for impeachment of the witness; and laying a foundation for an objection to "incompetent" testimony.

A basic query recommended by most of the manuals, and aimed at discrediting those who testify adversely, is "To whom have you talked about this case?" The trap, of course, is that the witness has necessarily talked at least with the attorney who called him. But he may believe that talking to others about testimony is forbidden or invalidates the testimony. Or else he assumes that the question reasonably excludes the calling attorney. His "No one" therefore permits the cross-examiner to pounce. The witness has been caught in a lie, the lawyer cries, and his entire testimony must be discounted—whatever it may be.

Another basic setup question attempts to capitalize upon the myth of perfect recall. For instance, of an event that occurred some 20 years before: "In what month was that?"—"Oh, you *think* it was May or June. You mean you don't *know*?"—"Well, which was it, then?"—"Ah, you're *not sure*? Your testimony is, then, *you don't remember*?"

The point, Goldstein instructs, is that "the more times. . . the lawyer can make the witness say 'I don't remember,' the better will be the

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psychological effect." For, explains Ehrlich in *The Lost Art of Cross-Examination*, "It is impossible in a court of law to place confidence in the evidence of a witness who can be reduced in cross-examination to saying 'I do not remember.' "

The examiner's manner is often more important than the substance of his question. The approach may be verbal, tonal, or silent altogether. A grin, eyebrow lift, or "listen-to-that" shrug toward Bench or jury box may invite emotional conspiracy. The dismissing of a witness with "That will be all!" in triumphant tone may pretend that damaging testimony was instead a coup. Another device is to address a witness as "Sir" or "Madame" in a heavy sneer that, if verbalized outside the courtroom's permissive ground, would approach slander.

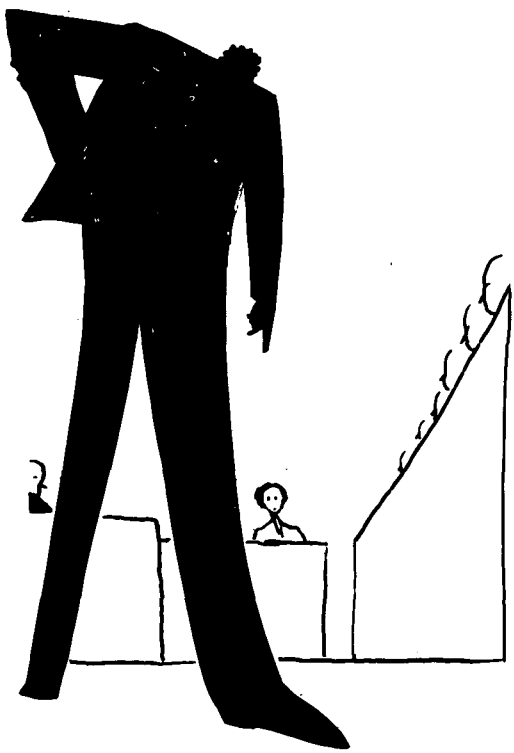
Such techniques are particularly useful in that they do not appear in any written transcript of proceedings. Thus, an Appeals Court, which rules only upon matters of law and accepts the lower court's version of fact, has no clue to any emotional aura that may have influenced the lower court.

Cornelius writes, "Counsel may use silence effectively in cross-examination by rising slowly as if to question the witness, and then with a tolerant smile toward him and an attitude that seems to say, 'Oh, what's the use, this witness is of no importance anyway,' take his seat with the statement 'I believe I do not care to cross-examine.' "

Wellman, in *The Art of Cross Examination*, offers a variation:

"If the witness happens to be a woman, and at the close of her testimony-in-chief it seems that she will be more than a match for the cross-examiners, it often works like a charm with the jury to practice upon her what may be styled the silent cross-examination. Rise suddenly, as if you intended to cross-examine. The witness will turn a determined face toward you, preparatory to demolishing you with her first answer. This is the signal for you to hesitate a moment. Look her over good-naturedly and as if you are in doubt whether it would be worthwhile to question her—and sit down. It can be done by a good actor in such a manner as to be equivalent to saying to the jury, 'What's the use? She is only a woman.' "

Silent cross-examination, which offers the witness no opportunity to refute the examiner's clear but unspoken slur, is (for the lawyer) the safest way of doing battle. But if the lawyer has foregone that prudent technique, or placed upon the stand a witness who despite all has bested him, there is still one trick left: "Failing to make a point on cross-examination, and especially when the witness has scored against you, dismiss him with some remark that will provoke a laugh—at his



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expense, not yours."

Ehrlich suggests, "Whenever the witness is apparently honest and has tried to give his best recollection of an occurrence, any cross-examination undertaken should be pursued only to the point of obtaining some favorable limitation of. . . his direct testimony. Then he should be dismissed with an air suggesting that his entire testimony lacks importance."

Cornelius suggests a diversionary tactic: ". . . If the witness is an honest one and tells a clear, straightforward story, do not cross-examine him upon the main story, he will only emphasize it. Cross-examine him for lack of memory, for distances, for marks of identity, for religion, for politics, for anything but his story. . . . In other words, if you are cross-examining a clear-headed, honest witness, never give him a chance to repeat his story, but *pull the attention of the jury away from it*. . . . " (my emphasis)

And Lake, in *How to Cross-Examine Witnesses Successfully*, puts forth this maxim: "No matter how clear, how logical, how concise, or how honest a witness may be or make his testimony appear, there is always some way, if you are ingenious enough, to *cast suspicion on it*, to weaken its effect."

What then about cross-examination's search for "fact," for those "qualifying circumstances of the subject of testimony?" Replies an attorney, ". . . advocacy requires a lawyer to start with something to be proved. . . . He will waste a lot of time if he goes with an open mind. . . . He fixes on the conclusion which will best serve his client's interests, and then he sets out to persuade others to agree." The basic axiom, echoed and re-echoed in the manuals, is "Never ask a question unless you know just what the answer will be" or what "will aid your cause."

In *Trial Evidence*, Reynolds advises, "Never ask for explanations unless you are perfectly *sure* they cannot be given. It is always much better to point out the improbabilities and contradictions in a witness' testimony, in the argument to the jury, than to let him explain them away upon the stand." Often, he adds, "the best method to deal with an adverse witness is to decline cross-examining him at all, which, if done with a rather supercilious air, will frequently impress the jury with the idea that his testimony is either totally untrustworthy, or else has little or no bearing upon the case."

Wellman reiterates, "David Graham. . . once said, 'A lawyer should never ask a witness on cross-examination a question unless in the first place he knew what the answer would be, or in the second place he didn't care.' Certainly no lawyer should ask a *critical* question unless he is reasonably sure of the answer." "Listen," I heard one judge shush a persistent attorney, "you keep on asking questions, you may get an answer you don't want!" In other words, information that is not ammunition must be shunned as the vessel shuns the fatal reef.

What, then, of the claim that cross-examination, by exposing the witness' demeanor for observation, permits the court to determine the weight and value of his testimony? More often, the witness' demeanor is made another weapon against him.

It is, said a professor of law, "ethical for defense counsel to cross-examine a prosecution witness to make him appear to be inaccurate or untruthful, even when the defense attorney knows that the witness is testifying accurately or truthfully." Ehrlich maintains that tangling up most witnesses by such means is fairly easy. And Mr. Justice White, speaking from the height of the Supreme Court Bench, noted that if defense counsel can "confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course."

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The scenario may go like this:

Attorney (leading question): "And when you went to San Diego, with whom did you go?"

Witness (definitely): "I didn't go to San Diego."

Attorney (pantomimes eyebrow-lifting surprise, then, rubbing an ear, the possibility of a hearing impediment): "Excuse me, Your Honor" (adroitly catching the judge's wandering attention and at the same time subtly engaging him on the attorney's side), "but I don't think I caught the last answer."

Judge: "Will the court reporter please read back that last question to the witness?"

Court Reporter: "And when you went to San Diego" (twice now, judge and jury have heard that the witness "went to San Diego"), "with whom did you go?"

Witness (impaled now on the eyes of the entire courtroom—jury, judge, lawyers, reporter, clerk, bailiffs, witnesses, and a gaggle of off-the-street gapers): "I [swallowing]—didn't go to San Diego."

Attorney (openly, hugely incredulous): "You didn't *go* to *San Diego*?"

Witness (hesitating just a fraction too long): "No."

Attorney (eyes ablaze): "Do you mean to tell this Court that you have *never* been to San Diego?"

Witness (whose own attorney has warned him never to say "never" in the witness box, but who in fact has never been to San Diego): ". . . Uh . . . Yes."

Attorney (smiles, reaches for his briefcase. In dumb show he searches through it, removes a file folder; "accidentally" drops it, thereby assuring it as a focus of attention; finally retrieves it and meaningfully waves a sheaf of papers which suggest reams of incriminating material—but which are actually blank): "You're *quite sure* of that, are you?"

Witness (hypnotized by the menacing papers and now certain that he must, during some amnesiac period or astral life, at least have passed *through* San Diego—but still unable to recall it): "Um. . . Uh. . . [weakly]. . . Yes."

Attorney (triumphantly slams papers down and barks in a fierce tone of utter contempt): "*That* will be all!" (He lifts his hands and bows to the judge and jury, silently miming, "What can you do with such a liar?")

Neither the glares, vocal tones, incriminating-paper trick, nor eyebrows will appear in the transcript.

The witness stand has been called by both Roscoe Pound and John Henry Wigmore "the slaughterhouse of reputations." The decimation of witnesses remains a favorite modern trial tactic. ". . . The attorney is *obligated*," said a law school dean, "to attack, if he can, the reliability or credibility of an opposing witness whom he *knows to be truthful*" (italics mine). This technique is officially called "discrediting" or "impeachment."

For example:

A 22-year-old daughter of a local bank president who is engaged to a promising young minister in town has allegedly been raped. The man accused of the crime admits to his attorney that the charge is true. However, there is a rejected suitor, "Jones," willing to testify truthfully that he frequently had intercourse with the girl and that she "behaved in a scandalous way towards strange men."

Ask the legal theoreticians: Should the defense attorney use these facts to impeach the girl and, if necessary, call the rejected "Jones" as witness? The lawyer knows that his client is guilty and the girl truthful. He has "one purpose, and one purpose only, in using the suitor's testimony to impeach the girl: to destroy her credibility before the jury and thus make it appear, contrary to fact, that she is lying about the rape." Should he proceed?

Yes, say the seekers of truth.

The case is hypothetical. But the

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answers are not. The question was put to a symposium of the Federal Bar Association in Washington, D.C., in September 1966. There were four papers presented, and a panel discussion followed.

The deputy director of the Legal Aid Society for the District of Columbia, Addison M. Bowman, stated, "I would tender the witness Jones. His testimony is not false, although, given my knowledge of the facts, I am aware that there was no consent and Jones' testimony creates the impression that there was consent." And the U.S. attorney for the District of Columbia, David G. Bress, said: "Even though defense attorney may know that a government witness is telling the truth, it is nevertheless entirely proper to cross-examine for the purpose of showing the limited weight to be given to the testimony of that witness." George Washington University professor of law James F. Starrs asked, rhetorically, whether his client's confession of guilt should "in any way affect the ardor" of defense counsel's cross-examination of an adverse witness who happens to be telling the truth. "Not one whit," he answered, "unless ours is a system which makes the search for truth preeminent. In that event anything which obstructs that search is impermissible. But, as we know it, cross-examination merely puts the weight and sufficiency of the prosecution's case to the test. This is perfectly acceptable even though the truth may be dimmed in the doing."

The fourth participant, concurring, stated that "the function of an advocate, and particularly the defense advocate in the adversary system, is to use all the legitimate tools available to test the truth of the prosecution's case [and] the testimony of bad repute of the complaining witness, being recent and not remote in point of time, is relevant to her credibility." According to Professor (now Dean) Monroe Freedman, this last participant was "even more explicit in the question period following the panel discussion: he considers it ethical to cast doubt on the girl's credibility by destroying her reputation, even though the lawyer knows she is telling the truth." Who is this last participant? Warren Burger, then judge of the U.S. Court of Appeals, and now chief justice of the Supreme Court of the United States of America.

In other words:

Jones' testimony "is not false," says Bowman, and should therefore be used, although all that it implies and is intended to imply *is* false. It is entirely proper to cross-examine, says Bress, for the purpose of showing the "limited weight" to be given the victim's testimony—even though it is the truth to which limited weight will be given. It is ethical, says Burger, to attempt to destroy both the girl's reputation and the truth of the case, because the testimony of her "bad repute" (a "legitimate tool") is recent and therefore "relevant to her credibility"—even though the impression it gives of her credibility is a lie.

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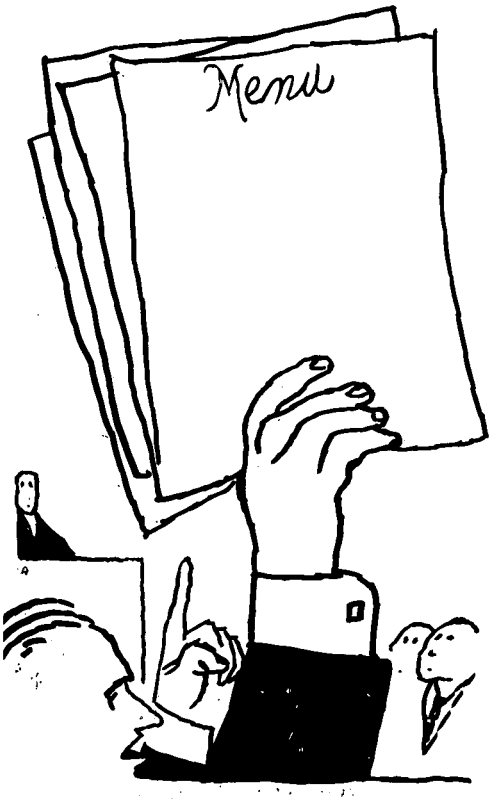

And the result? If the legal con-game is successful, the seeker of fact is misled, the guilty defendant is freed, while the victim suffers an additional, and this time public, outrage at the hands of a procedural system to which she looked for help. Meantime, that exposure of her most personal history may have irreparably damaged her relationship with her conservative family and fiance. Of course—the case is hypothetical.

This case is not (identifying information has been altered): In 1975, a woman in her forties, "Mrs. Wilson," a widow employed in a responsible position as an educational consultant by the school system of one of our Western states, was accosted by a man in an unguarded municipal parking structure. He forced her at knifepoint into his car, poured rum down her throat until she was sick, and raped her several times. Finally a scream attracted the attention of a passerby, who called the police. The rapist was caught in flagrante delicto, and the victim driven to a hospital, where she remained for one week. When she recovered, Mrs. Wilson was summoned by the State as a prosecution witness against the accused.

The defense attorneys chose an entirely permissible battle strategy: they decided to attack. (Though a number of jurisdictions are now limiting the extent to which the rape victim's sexual history may be pursued, a defense attack upon the victim is still too common in rape, and in other crimes, almost standard.)

Thus the defense attorney queried as follows: Was it not a fact that Mrs. Wilson had solicited the defendant's attentions? ("No," she said.) Was it not a fact that she had voluntarily entered his car? ("No," she said.) Had she not willingly gotten drunk with him, indeed given him a $10 bill to purchase the liquor? ("No," she said.) Had she not deliberately failed to call the attention of the parking structure's exit-guard to her plight? ("No," she said.) Had she not, at three separate opportunities, avoided the possiblity of rescue by police cars cruising by? ("No," she said.) Was it not true that, as a widow, Mrs. Wilson was "hungry for male companionship"—and now and then purchased it? ("No," she said.) Was it not, in fact, Mrs. Wilson who had actually seduced the man she now called her attacker, and who was so much younger than she—a boy, really! ("No," she said.) Was she not, actually, a sometime prostitute? ("No," she said, and wept; and could not stop.)

Two years later, the rapist (who eventually pled guilty and was sentenced to 12 months) is one year free. But Mrs. Wilson is not. The scene in her car and the scene in the courtroom are fused in her nightmares. She continues to weep. Her health has deteriorated: she has developed high blood pressure and a heart condition. She lost her job and, under medical

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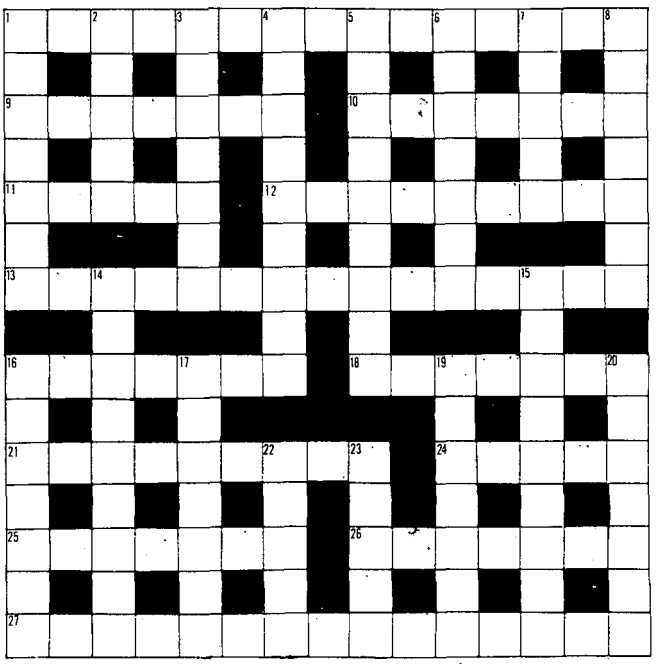
the political puzzle

by John Barclay



Across

1. Perhaps you ruin Tad again on January 20. (12,3)
9. Headed a musical in December reverse. (7)
10. Capitol feature and tour arranged. (7)
11. Far out in result raises questions. (5)
12. Clam never turns out to be smart type. (6,3)
13. Exported friends confused after 1 across. (2-9,4)
16. British leader's leaders. (7)
18. Little kids, and their fathers. (7)
21. Raise rent around servants. (9)
24. Greet a fine-feathered friend. (5)
25. One turn can be made o.k. on CB. (3-4)
26. She puts a GI back in Bali disturbance. (7)
27. Trace ten diapers in White House after 1 across. (9,6)

Down

1. Uncle I'd fix up to cover. (7)
2. Look for a heavy load I hear. (5)
3. Men rage about the relevant. (7)
4. Decrease by spreading crude on it. (9)
5. Hallmark of milking stool. (5,4)
6. We stout people gather in Calif. (3,4)
7. Fabric mined up North. (5)
8. December 31 can become desired. (7)
14. Regret confusion of tine in pennies. (9)
15. Get too upset about cover rate. (9)
16. Eavesdrop on aerial dance? (7)
17. Mix oil after visit in Libya. (7)
19. Camera eye upset right here. (7)
20. Let rest come around after he digs in. (7)
22. Sounds weird in Pennsylvania. (5)
23. Where the tarts first come out. (5)

The numbers indicate the number of letters and words, e.g., (2, 3) means a two-letter word followed by a three-letter word. Groups of letters, e.g., USA, are treated as one word. Answers to last month's puzzle are on page 56.

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orders, cannot take another. Her financial situation has grown precarious, her personal prospects grim.

In criminal law, the rationale that justifies this savaging is that, since the defendant must be presumed innocent until proven guilty, his attorney is entitled to "put the government to its proof" by (among other things) making the prosecution witness appear to be lying. Under this theory, for example, the defense attorney is privileged to withhold evidence, while his client (guilty or innocent) may not be forced to take the stand. Stated Supreme Court Justice Byron White, ". . . as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."

Adversary process is by definition either-or. Any action requires two sides: it is polar, intransigent. "Against" is the only legal posture possible: "Smith *versus* Jones," "The People *versus* John Doe."

No third person may enter the legal lists without declaring himself, or being declared by the Court, "for" one side or the other; "friendly" or "hostile." There is no designation in legal language for an impartial witness at the trial court level. *Amicus curiae* ("friend of the court") appears only at the appellate level—where 99 per cent of cases never arrive. Hence there is no witness who speaks for neither side but simply to widen the contextual perspective. Indeed the litigant, witness, or attorney who in the course of a trial attempts to do so is penalized. (A law professor, explaining why the Patricia Hearst trial failed to shed expected light upon human motivation and behavior, said: "One side gets up and yells white and the other gets up and yells black while we're talking about shades of gray. There is no room in the law for the advocacy—or the exploration—of the shade of gray.")

Even the expert witness is called not for disinterested enlightenment wherever it may point, but *by* a side, *for* that side: he is painstakingly interviewed in advance and chosen to assure that testimony given will support *only* the calling side (and/or serve as ammunition against the opposition). In fact, expert witnesses, deftly questioned to bring out specific material and nothing more, are in Roscoe Pound's words "partisans, pure and simple." More recently, psychiatrist Thomas Szasz commented concerning the Hearst case, "In criminal trials. . . there are two types of psychiatrists: excusers and incriminators. The former, hired by the defense, are paid to offer psychiatric prevarications that tend to excuse the accused. The latter, hired by the prosecution, are paid to offer psychiatric prevarications tending to incriminate the accused. If a psychiatrist is unwilling to offer such testimony, he is not hired."

To offer in court any approximation of the statement, "Well, the fault wasn't *entirely* hers," can be fatal. ("Christ, are you crazy?" I listened to one lawyer chide a client. "The judge'll throw us right out!") Within a polar frame, failure to deny a charge in toto constitutes admission of total culpability.

Judges and juries must believe one side *or* the other (no matter that they frequently believe neither), must decide *for* one and *against* the other. It remains inconceivable that truth could ever lie in between. A "win" system must have a winner and a loser. The win and loss must be absolute.

Thurman Arnold has written: ". . . the ordinary teacher of law will insist 1) that combat makes for clarity, 2) that heated arguments bring out the truth, and 3) that anyone who doesn't believe this is a loose thinker. The explanation of this attitude lies in the realm of social anthropology." ■

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Freeing the Guilty

by Tom Bethell

United States of America v. Willie Decoster, Jr. is a ponderous title, suggesting the awesome weight of the United States government being brought to bear upon some hapless victim—poor Willie. But that would not be an accurate way of looking at this particular criminal case, since in fact it was Decoster who had the awesome weight of the government on his side, and the prosecution that was the hapless victim. The Decoster case makes it clear that some courts are prepared to go to quite extraordinary lengths to protect criminal defendants.

In some ways the Decoster case reminds one of the Gideon case. *Gideon* preceded *Decoster* by just ten years. It involved a criminal defendant named Clarence Gideon, whose lone appeal was heard by the Supreme Court, and whose conviction for burglary was there reversed because he had been tried without benefit of counsel. After his conviction was reversed Gideon was tried again, this time with a lawyer, whereupon he was acquitted.

Decoster, it could be said, is *Gideon* Through the Looking Glass. Willie Decoster was convicted of armed robbery, having been represented at trial by a court-appointed attorney, but the United States Circuit Court of Appeals for the District of Columbia—the majority opinion was signed by Chief Judge David L. Bazelon and Judge J. Skelly Wright with Judge George MacKinnon dissenting—found that his lawyer did not do an adequate job, and so reversed his conviction, even though at sentencing Decoster had in effect admitted his guilt to the sentencing judge. This, then, is the distance we have traveled in the decade since *Gideon*. In the former case a higher

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court overturned a wrongful verdict—the accused lacking a lawyer. In the new case a higher court overturns a just verdict—the accused being defended by a lawyer who merely failed to win an acquittal.

The crime was committed at about six o'clock in the evening of May 29, 1970. At that time Roger Crump emerged from a bar, known as the Golden Gate Club, in Washington, D.C., and was set upon by three men, one of whom held a weapon in his hand. Crump was robbed of his wallet, which contained $110. Just as he was being robbed, however, two plainclothes police officers drove by in a patrol car, saw the holdup taking place, and swiftly came to the rescue. The assailants fled, but Officer Paul R. Ehler caught and arrested two of them, Earl Taylor and Fred Eley. Taylor had a straight razor in his pocket.

Officer Carl Eugene Box chased the third man, who had taken off in a different direction, entering a nearby hostelry called the D.C. Annex. Without ever losing sight of him from the moment that he saw him participating in the robbery, Officer Box caught up with the man in the lobby and placed him under arrest. His name was Willie Decoster, Jr. Almost immediately, Roger Crump came into the D.C. Annex and identified Decoster as the man who had robbed him. Crump's money and wallet were never found, however.

The next day Willie Decoster made the first of what would prove to be an extraordinary sequence of appearances in courtrooms before magistrates and judges of every description—local, district, and circuit—extending over a period of six years, in a case in which he was caught as nearly red-handed as it is ever the misfortune of a criminal to be caught. Since the U. S. Attorney's Office has appealed Bazelon's and Wright's reversal to the full, nine-member Court of Appeals, the litigation is not over yet, and might conceivably go to the U. S. Supreme Court.

The day after the crime was committed, Decoster and his codefendants Eley and Taylor were arraigned before the magistrate, Judge Fred McIntyre, who appointed an attorney for Decoster, one Barney J. Keren. At arraignment, Decoster's bond was set at $5,000, which he was unable to pay, so he was held in custody in the D.C. jail. This bond figure was not unreasonable, however, because Decoster was already a fugitive from justice at the time of his arrest by Officer Box, a bench warrant having been issued for his arrest in South Carolina after he had jumped bond there on a charge of carrying a concealed weapon. Furthermore, as a juvenile Decoster had been involved in a robbery in the District of Columbia and had been sent to the Receiving Home, from which he had promptly escaped. For these reasons, and because he had no fixed address, the D.C. Bail Agency did not recommend any conditional release or personal recognizance for Decoster.

The following week, on June 8, 1970, Decoster was brought before a second judge, General Sessions Judge William C. Pryor, for a preliminary hearing. Officer Ehler was the only witness, and as a result of his testimony—"Mr. Decoster and Mr. Eley had a hold of the subject, the complainant. One of them was yoking him, I don't know which one it was at the time, and they were removing something from his pockets"—all three defendants were held for the grand jury, which was the next rung up what would turn out to be an apparently endless judicial ladder.

The grand jury heard the case—presumably Officer Ehler testified once again—and on September 11, 1970, all three defendants were indicted and charged with armed robbery and assault with a dangerous weapon: criminal case no. 1490-70. After indictment the defendants appeared for a second arraignment before yet a third judge, and they pleaded not guilty. Barney Keren was

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David Suter

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re-affirmed as attorney for Willie Decoster. The case was set for trial in January 1971.

But at about this time Roger Crump, the victim in the case, was seriously injured in an automobile accident in Georgia. The case was duly called for trial on January 12, 1971, but a continuance was immediately granted by District Court Judge Joseph Waddy when the prosecutors revealed that Crump had suffered injuries and was still in the hospital. In deference, as it were, to Decoster, who would now be kept waiting in jail even longer because of the new delay, the judge released him two days later to the custody of an organization called the Black Man's Development Center, contrary to the advice of the Bail Agency.

Within a week Decoster had absconded for the third time, and a bench warrant was issued for his arrest. He was not rearrested until September 1971, eight months later, and then only because he was picked up in connection with another crime, for which he was later tried and convicted.

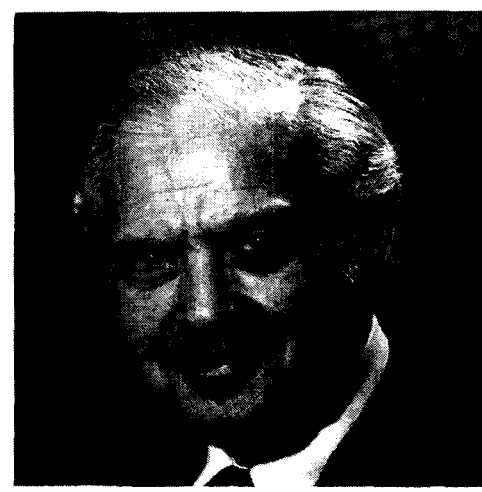
In the interim, however, there had been a most unpromising development as far as Decoster was concerned: his two co-defendants, Eley and Taylor, had gone on trial before Judge Waddy in June 1971, and in the middle of the trial both had changed their minds and decided to plead guilty to the lesser charge of robbery. Each received an 18-month to five-year suspended sentence, and they were placed on probation.

Decoster's trial began on November 15, 1971, before Judge Waddy. Keren, in his cross-examination of Crump, brought out that because of the ill effects of his accident Crump could no longer identify Decoster or say who had wielded the razor in the robbery—this being such an effective line of defense that it was later incorporated into Decoster's appeal. Still, Fred Eley, one of the confessed participants in the robbery, flatly contradicted Decoster's tales of his innocence, and Decoster was found guilty by the jury.

Two and a half months later Decoster was sentenced, but before sentencing he wrote a letter to Judge Waddy, which was the subject of the following colloquy between them:

Waddy: ". . . . The court has received a long letter from the defendant himself, stating that he has learned the error of his ways and that he has found out that he was fooling with the wrong crowd, and that he had been using drugs and he now knows that the use of drugs could lead only to death or jail, neither one of which is acceptable to him. Mr. Decoster, do you have something you want to say on your own behalf?"

Decoster: "I just wanted the court to know that I was sincere in writing this letter. I feel like I can—well, I know I can be rehabilitated which I have did on my part in having to come to face the facts. It just seems like, you know—well, really, I left home when I was at an early age and I didn't have that much confidence and I just hooked up in the wrong places and in the wrong ways. But now I believe that I can—I know that given an opportunity that I can help my family



Chief Judge David L. Bazelon

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UPI

Judge J. Skelly Wright

as well as myself." Scarcely the words of an innocent man unjustly convicted.

Decoster received a two-year to eight-year sentence for his armed robbery conviction.

Later that month, on March 23, 1972, Barney J. Keren filed a notice of appeal on behalf of his client, and it was at this point that the United States Court of Appeals embarked on its prolonged "appellate odyssey" (as Judge MacKinnon characterized it) on behalf of Decoster, which ended four-and-one-half years later with the reversal of his conviction. But as we shall see, it took quite a bit of doing, *with the Appeals Court itself directing the course, step by step, that the appeal should take*. Chief Judge Bazelon, in particular, appears to have taken it upon himself to act not merely as an appeals judge but as Decoster's ex officio defense counsel as well.

Bazelon's first step was to appoint a new lawyer to handle Decoster's appeal. On April 11, 1972, it was ordered that Calvin Davison, Esq., of Reavis, Pogue, Neal & Rose, a big corporate firm, should represent Decoster. But it can't be too strongly stressed that at this stage the competency of Decoster's representation was not at issue. Keren was relieved of further responsibilities because he did not normally handle appeals, and because he requested to be severed from the case.

Davison pondered his case, and in his appeal wrote that "the major issues coming out of the trial are the sufficiency of the evidence that a dangerous weapon, i. e., a straight razor, was used in the commission of the robbery and assault, and whether the evidence was sufficient to convict appellant of aiding and abetting . . . ." He did not mention the competence of Keren's defense, and in fact he cited Keren's cross-examination of Crump as part of the appeal.

Bazelon, Wright, and MacKinnon looked this over, and what their innermost thoughts were we cannot say;

Judge George MacKinnon

but, in any event, the appeals court felt by March 21, 1973 that Decoster's new lawyer could try harder, and ordered him to submit a memorandum covering a couple of new points. Still there was no mention of Keren's adequacy as a defense lawyer.

Then, in October 1973, the appeals court ordered a full-dress rehearing of the Decoster case in Judge Waddy's District Court focusing on what Bazelon and Wright (MacKinnon dissented) said was now "the only serious issue in this case"—Keren's defense, which up to that point had never once been

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called into question. It was an issue brought into play solely by the judges.

Remember this is the case of a criminal whose crime was actually witnessed by the police, who proceeded to jump bail, who was tried and found guilty by a jury, who was given a lawyer from one of the country's leading firms to conduct his appeal, and who was now having the appellate court come up with reasons for letting him off that even the lawyer hadn't thought of.

The new hearing was held in the second week of February 1974, with testimony from Keren, Eley, Taylor, Decoster, and other participants. Perhaps the main point to emerge was that on the day his trial began Decoster told Keren he wanted his two codefendants to be subpoenaed. But not only had Keren not interviewed them, he did not know where they were. It had not been uppermost in Keren's mind to call them because, having already pleaded guilty, they would be likely only to implicate Decoster further (as Eley did, in the event).

Taylor could not be found; he was not at the address he had left with his probation officer. But Eley was easily found, because he was back in the D. C. Jail, having been arrested on another charge, and, as it happened, *he was sleeping one bunk away from Decoster*. That was why Decoster suddenly wanted his partner-in-crime on the witness stand. Decoster and Eley also traveled from the jail to the courthouse on the same bus.

Keren, at Decoster's suggestion, went to interview Eley. Keren recalled that Eley told him that as far as he could recall, Decoster had had nothing to do with the crime. Fine. Decoster's "alibi" was corroborated, and Keren put Eley on the stand, but then something went wrong, because Eley changed his story and said he had seen Decoster fighting with Crump. Why Eley did this is not known. Perhaps taking the oath persuaded him to tell the truth; perhaps he forgot what he was supposed to say. But the upshot

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was that Keren had clearly made a mistake in taking Decoster's advice and putting his accomplice on the witness stand.

Because of that mistake, more than anything else, Decoster's conviction has now been reversed by the United States Court of Appeals.

But notice, first, what happened when Judge Waddy, following orders from on high, reheard the evidence in District Court. He *denied* the motion for a new trial, concluding that "defense counsel was under no duty to assist the defendant in the fabrication of a defense," and that Keren had "raised the only defense available to him, which defense was putting the government to its proof." He added, interestingly, "in light of Decoster's posture and attitude during the course of these proceedings, this court cannot say that defense counsel substantially violated any one of the duties owed to his client." As for Keren's alleged failure to interview Decoster's codefendants, Judge Waddy found that Keren had been together with Eley, Taylor, and Decoster on six separate dates, "and on none of these occasions did Decoster suggest to Mr. Keren that either co-defendant was a possible witness for him."

It was obvious, then, that Decoster attempted to fabricate a defense only after fortuitously meeting up with Eley in the jail. Waddy, clearly, saw through the ruse, realized that Keren, not Decoster, was in the process of becoming a victim of "the system," and denied the retrial motion on April 23, 1975.

And so on it went. Back came Calvin Davison into the Appeals Court. Motion for rehearing the case granted by Judge Bazelon. And a new 30-page appeal was filed (remarkably promptly) by June 10, 1975. It seems likely that by now Davison's law firm realized that it had a "precedent-setting" case on its hands—that was the phrase that Bazelon himself used to describe it—even if it was Bazelon who seemed most determined to *make* it a precedent-setting case. It was this appeal that was finally heeded, in October 1976, with the reversal of Decoster's conviction signed by judges Bazelon and Wright.

In his dissent Judge MacKinnon said many an unkind thing, but perhaps most striking was his comment that Decoster was allegedly deprived of his rights because a more "thorough" investigation might have resulted in Decoster switching from one perjured defense to "a second perjured defense that had a better chance of succeeding."

If the Decoster opinion holds, it will henceforth be incumbent upon defense counsel to investigate the entire universe of fabricated defenses, and, Bazelon and Wright argue, failure to do so can be regarded as automatically constituting prejudice. This is explicit in their complaint that Decoster was prejudiced by a failure to seek out possible defense witnesses in the bar or in the D.C. Annex, even though there is no evidence on the record, and certainly none from Decoster himself, to suggest that any such witnesses exist. But a failure to conduct such investigations constitutes prejudice, thus giving grounds for reversal. In short, as MacKinnon commented, the distinguishing feature of this case is that it "creates a format in this circuit for the easy reversal of criminal convictions. The Decoster opinions are deftly crafted to that end. Such opinions would impose upon the government, once a jury has found a defendant guilty, the burden of proving beyond a reasonable doubt that every conceivable overly imaginative item of defense that any two activist judges could possibly conceive had been thoroughly investigated and researched."

Catching criminals is so desperately difficult—only a small minority are arrested and convicted—that it is absurd to have our judges worry about ways to free the guilty. ■

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The Revolving Door Between Government And the Law Firms

by John A. Jenkins

Federal Trade Commissioner Stephen A. Nye was in the job market. A San Francisco antitrust lawyer, Nye was cleaning out his desk at the FTC without any assurance, he told me, that a law firm would take him on. Had there been overtures from other firms? Not yet. It would be wrong to discuss employment with firms that had cases before the Commission. Nye would take a West Coast vacation, then start looking around.

Shortly before Nye left the FTC last year, I examined his phone and appointment logs, as well as those of his fellow commissioners. Of the outsiders who were listed as having visited Nye to discuss Commission matters (a perfectly legal practice), the name of Wallace Adair stood out. Adair, an attorney with the Washington law firm of Howrey, Simon, Baker & Murchison, represented Kennecott Copper Corporation, which was under an FTC order to sell off its $1.2-billion Peabody Coal subsidiary. Kennecott had been dragging its feet. It wanted the FTC to reopen the case and amend its divestiture order, and had retained Adair in an effort to achieve that result. Nye sympathized, but the other Commissioners wouldn't budge. Adair had made frequent visits to Nye's office while the case was before the Commission, in order "to make sure my vote was still a sure vote," Nye said at the time. He insisted that Adair had received no special treatment.

Weeks later, after Nye left the FTC, I phoned him at home. "He's not here," said the voice at the other end of the line. "You can reach him at Howrey & Simon. He started there yesterday."

"He's probably in Mr. Adair's office," the law firm's receptionist added cheerfully when I called.

John A. Jenkins is a Washington reporter who has covered the Federal Trade Commission.

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It would be unfair to suggest that Nye's partnership in Howrey, Simon was a quid pro quo for prior favors Nye may have granted the firm; there is no evidence to support that contention. But Nye's is not an isolated case. It happens in almost every government agency. Washington lawyers—be they in government or private practice—are a close-knit group. They are advocates for hire, and their frequent shuttles between public and private practice attest to that fact.

Consider the case of William Ruckelshaus, who was the first director of the Environmental Protection Agency from 1970 to 1973. In 1974, shortly after leaving the government, Ruckelshaus set up his own law firm. "Well over half the firm's initial partners were former EPA officials," said a recent *New York Times* article, "and at least in the beginning, a substantial number of its clients were those who had problems with the agency." Ruckelshaus' firm (he resigned his practice last year) quietly contacted his old agency 178 times in 1974 and 1975 on behalf of 20 different clients. The *Times* said the largest number of contacts, 37, were made for the Society of the Plastics Industry, a trade association vitally interested in air pollution controls that EPA is considering placing on manufacturers of polyvinyl chloride. The pollution controls that are ultimately imposed on polyvinyl chloride—which is believed to cause cancer at some stages of production—could cost the industry millions of dollars. Weaker controls would be cheaper.

The *Times* account about Ruckelshaus alleged no wrongdoing on his part, or on that of his law firm. It was just another demonstration of the way Washington lawyers gain power from government service, and then use it to their clients' advantage. The very corporations Ruckelshaus regulated when

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he headed EPA were paying him handsomely to use his considerable influence at the agency on their behalf. For a Washington lawyer, this is simply business as usual. Agency alumni who become Washington lawyers continue to be part of the agency's inner circle, enjoying easy access to their successors in government. Sometimes, it's as if they had never left.

"There is at least one palpable benefit to Washington lawyers who were government officials," writes Mark Green in *The Other Government*. "As a Securities and Exchange Commission lawyer said of a phone call from Manuel ('Manny') Cohen, once SEC Chairman and now a Wilmer, Cutler & Pickering partner: 'You know, I still jump when he calls.' "

"The story is told of the lawyer who enjoyed a three-martini lunch during a hearing before the Interstate Commerce Commission," author Joseph Goulden says in *The Superlawyers*. "When time came for the proceedings to resume, he instinctively sat down in the hearing examiner's chair and gaveled for order. Someone had to remind the poor fellow he had resigned two years previously and belonged at the counsel table on behalf of a trucking firm."

Newton Minow is perhaps best remembered for the "vast wasteland" comment he made about television while serving as Federal Communications Commission chairman. During his 1961 FCC confirmation hearing, a senator asked Minow why he was qualified to become the commission's chairman.

"Two things," he replied. "First, I'm not looking for a job in the communications business; and second, I don't want to be reappointed." Today, Minow is a Chicago lawyer. He represents AT&T.

There is something unsettling about the ease with which lawyers can slip in and out of government. Cynics wonder whether the implicit promise of a lucrative law partnership later on is incentive enough for a government

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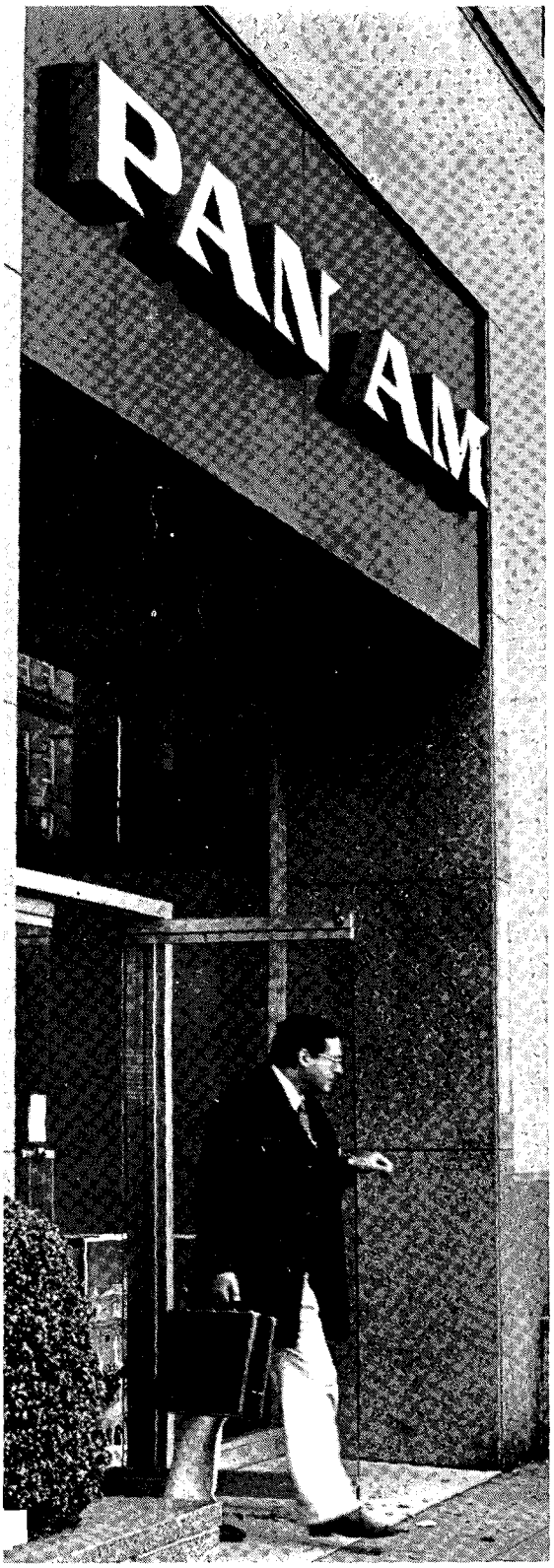

Gail S. Rebhan

lawyer to do favors for the defense. The United States has more lawyers per capita than any other nation, and as their numbers increase, our trust in them declines. Public mistrust of lawyers breeds mistrust of the regulatory agencies they deal with, and, ultimately, mistrust of the government itself.

Even the lawyers themselves don't trust one another. Washington's hottest legal battle these days isn't taking place in a courtroom. It is being waged within the District of Columbia Bar's Legal Ethics Committee—a group of lawyers whose job is to regulate other lawyers.

Although Congress, the American Bar Association, and the federal agencies have long recognized that conflicts of interest can occur when lawyers switch sides, it is only now, perhaps due in part to a twinge of post-Watergate morality, that the issue is being seriously addressed. The D. C. Bar's ethics committee has been considering adoption of a new conflict-of-interest rule that would prohibit an entire law firm from handling a case if one of the firm's partners worked on it while he was in government. Washington law firms claim they hire so many ex-government types that the blanket disqualification rule would make this city a legal ghost town. Federal agencies, in turn, contend that the rule would make it impossible to recruit bright new legal talent, because top law school graduates would sign up immediately with private law firms to avoid the disqualification problem altogether. Together, law firms and federal agencies have reacted to the D. C. Bar's proposal like matrons confronting a cockroach. They are flailing away, doing all they can to kill it.

At the center of this controversy are the means by which the conflicts of interest that arise when a government attorney departs federal service and joins the other side can be avoided. A lawyer could take with

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him a wealth of knowledge about the government cases he's been prosecuting and use that knowledge against the government, to the advantage of his clients in private industry. The 1962 federal conflict-of-interest law clearly prohibits this—it says that a former government attorney is disqualified from representing anyone else in matters that he "personally and substantially" worked on while with the government.

But if one lawyer is disqualified, what about the other members of his firm? The disqualified lawyer could skirt the law by sharing his knowledge with others in the firm still working on the case. Agencies have sidestepped this sensitive issue by permitting others in the firm to continue handling a case as long as the disqualified attorney is "screened" from participation. This means he may not discuss the matter with his colleagues, and he may not share in fees his firm receives from the case.

It is this screening process that the D.C. Bar's ethics committee is calling into question. The panel's draft opinion says, essentially, that the process is a sham—an unenforceable scheme cooked up by lawyers who want their economic pipelines to the agencies to remain open regardless of the potential for abuse.

"There have been abuses of the screening process, I don't think there has been any question of that," says Hofstra University Law School Dean Monroe Freedman, prime mover of the proposal and until recently the ethics committee's chairman. "There isn't a single lawyer in Washington who will tell you there are not abuses. The abuses are not of low visibility, they're absolutely invisible. That's the problem. All you have to do is walk into the next office and close the door, or chat over lunch, or at somebody's house at dinner time."

Traditionally, lawyers have recognized that when one member of a law firm is disqualified from working on a case, his other partners are also disqualified *unless* the opposing party "waives" disqualification and permits the firm to screen out only the disqualified lawyer. Waivers are routinely granted in private litigation, and even though the federal conflict-of-interest law says nothing about the government's prerogative to waive disqualification, agencies regularly do so. But these agencies almost never disclose the standards they apply in deciding whether to permit participation by a former agency attorney or his law firm; only now, in the wake of the D.C. Bar's action, are some beginning to do so. Only a few agencies, like the Federal Trade Commission and the Federal Maritime Commission, have written their clearance regulations into the federal code.

The Justice Department, which handles federal conflict-of-interest prosecutions, lacks published clearance standards. The conflict-of-interest law underlying the agency rules is so loosely administered that Justice has sought to prosecute only six individuals in the past ten years for violating it. Agencies made 40 recommendations for such prosecutions during that period.

Several years ago, a reporter who wanted access to the FTC's clearance records was forced to file a Freedom of Information Act request, wait six months, and then pay hundreds of dollars in "search fees" before the Commission finally produced the records. Once obtained, they showed haphazard and inconsistent application of the clearance rules; in no cases were reasons given for clearance decisions. The resulting series of articles pressured the Commission into making all future clearance decisions public—an action without bureaucratic precedent. Then, as now, the Commission was giving its former employees every benefit of the doubt; rarely were they disqualified from participation in agency proceedings.

A former FTC executive director

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had asked permission to represent some auto dealers being sued by the Commission, and the Commission had given its approval—even though that same official had responsibility for the lawsuits while at the FTC, and "probably" had seen three confidential memoranda discussing the cases. Commission chairman Lewis Engman wanted the lawyer disqualified. "The Commission has a duty to the public not only to *assure* it of absolute scrupulousness, but to *convince* it of that fact," he wrote. "In effect, the majority is asking the public to believe the Commission on blind faith. They are saying in essence, 'Although the memoranda sent to the official's office are non-public, take it from us, those memoranda really are not sensitive.' This is not very convincing to me."

Still later, in a similar case, Engman castigated his colleagues for again siding with a former employee on a close clearance question. "We must put aside our personal beliefs about his actual inside knowledge and view the case instead from the public's perspective. The public has no access to the particular facts of these clearance cases. Unable to read the documents or investigate the employee, the citizen on the outside can look only to the kind of position the employee occupied, and the kind of inside information he was likely to be exposed to in that position, when drawing a conclusion about the propriety of clearance. To prevent that conclusion from being a cynical one, I would adopt a stringent standard. I would deny clearance whenever a former employee acquired, or was in a position where he typically would have acquired, non-public information which either is in fact sensitive or belongs to a class which typically is sensitive." Engman said his standard "may disappoint ten worthy lawyers for every scoundrel it deters," but "the sweep of this basic rule is sensible, if, as I suggest, apparent impropriety is related to the broad issue of government accountability."

Engman's minority view would have relatively few lawyer adherents inside government (and none outside), because officials realize that the clearance decisions they make now will be applied to them later. It's as if the officials had a vested interest in keeping clearance actions secret, and clearance standards purposely vague.

"The screening device, itself, involves a serious conflict of interest," says Monroe Freedman. "It compounds the conflict of interest. Take the situation at the Federal Communications Commission, where Dean Burch's law firm was challenged. He was a former chairman of the FCC. Five commissioners ruled that Dean Burch's law firm should not be disqualified. They simply said Burch should be screened. Every one of those commissioners, for practical purposes, was deciding his own case for next year. And that's the conflict of interest in the screening device. The conflict is compounded by having it decided in the very agency where you're worried there is a conflict."

There is a certain irony to Nicholas Katzenbach's post-government employment record. Katzenbach was attorney general during 1965 and 1966, when the Justice Department commenced a major antitrust investigation of IBM. The government filed its lawsuit against the giant corporation in 1969—about the same time Katzenbach became IBM's general counsel. Before he joined IBM, officials of Justice's Antitrust Division, which had developed the lawsuit, provided their former superior with a memorandum stating that a search of the division's files had not disclosed evidence of "any direct decision-making involvement" by Katzenbach in the IBM case. The division's "comfort letter" was unusual, a recent study by the Washington-based Center for Law and Social Policy pointed out, because the expression "direct decision-making in-

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volvement" is narrower in scope than the statutory standard for attorney disqualification. The 1962 federal conflict-of-interest law says former government officials are disqualified from cases in which they participated "personally and substantially... through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise."

Without having any "direct decision-making involvement" at Justice with regard to the IBM antitrust investigation, Katzenbach could have been advised of it, could have discussed or rendered advice on the case, or could have been completely familiar with it.

A promising attorney actually might pass through the revolving door several times during his career. At the outset, there would be a postgraduate indenture at, say, the Securities and Exchange Commission or the FTC; then a term as a law firm associate. At mid-career, he might move back into the commission as a general counsel or a senior official, later to grab the brass ring—a partnership in a major law firm, with an accompanying six-figure income.

At the Food and Drug Administration, Washington's regulatory Sisyphus, the revolving door turned smoothly for Peter B. Hutt, who was the agency's general counsel from 1971 to 1975. Hutt, a specialist in food and drug law, came to the FDA from Covington & Burling, a law firm generally regarded as among Washington's most prestigious, and one that represents many food and drug companies regulated by the FDA. The appointment raised eyebrows on Capitol Hill. Rep. Benjamin Rosenthal said Hutt "should not be appointed to a job of supervising his former clients. Every decision he makes is under a cloud. It is time that we in Washington say that the in-and-out incestuousness between industry and the regulatory agencies has to end." No one disputed Hutt's expertise in the field; nor has anyone alleged that Hutt carried out his FDA duties with anything less than complete dedication and diligence. The issue was, and continues to be, one of improper appearances. Would C & B clients unfairly benefit from Hutt's FDA work?

In any event, the agency received the value of Hutt's considerable legal expertise in the food and drug field, and Hutt got an insider's perspective on how the FDA operates. Hutt recently returned to C & B, and that has been the cause of still more controversy. His predecessor as FDA general counsel became president of the Institute of Shortening and Edible Oils, and his successor, Richard Merrill, was a University of Virginia professor who also served a stint at C & B. At least one other FDA lawyer recently jumped directly to C & B. ("They have a Divine right," Rep. Robert Drinan said of Covington's special relationship with the FDA.)

A perusal of the richly bound volumes of the *Martindale-Hubbell Law Directory* can tell us a great deal about the Washington lawyers who switch sides. One of the most successful was Mortimer Caplin, Commissioner of Internal Revenue in the Kennedy Administration. The government's number-one tax man set up his own law firm (Caplin and Drysdale) in 1964 to counsel corporate clients on the intricacies of avoiding Uncle Sam's tax bite, and today his firm is the country's most prestigious for tax work. *Martindale-Hubbell* says five of the firm's seven other senior partners left government with, or shortly after, Caplin. In fact, the general counsel's offices at Treasury and IRS must have been severely depleted by the time Caplin got through combing them for law partners.

"Caplin essentially founded a law firm on the basis of his service as a commissioner," said a colleague who didn't want to be identified.

"His is the leading tax firm in the

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Diana H. Walker

Monroe Freedman: "There has been intensive lobbying on a personal level."

country, and he is their business getter," said another lawyer. "You might as well call the firm 'Former Commissioner of the IRS and Drysdale.' On the other hand, they are *very good.* He set up the firm, so it was hardly a situation where he was looking for a job [while commissioner] among law firms who were practicing before him."

Caplin's successor at IRS was Sheldon S. Cohen. He too set up his own tax law firm when he left IRS in 1969. Three of the firm's four other partners were government tax lawyers who left IRS or Treasury with Cohen, according to *Martindale-Hubbell.*

"It's almost expected" that government tax lawyers will use federal service as a stepping stone to a lucrative private practice," says an experienced tax lawyer who did that himself. "You can't get these people to take the job otherwise. The typical tax attorney is knocking down $100,000 a year in private practice. The way we manage to compensate them [for lower government salaries] is by enabling them to use these jobs as a useful step in their upward mobility. Treasury can offer useful inducements to upward mobility. Tax attorneys are there only to advance their own personal careers. And that's disastrous from the government's point of view."

This frequent turnover can be murderous for the agencies, killing continuity, stalling important programs, and generally making it more difficult for them to fulfill their missions. The turnover problem is so acute at the FTC that a Connecticut consulting firm was called in to recommend a solution. More than 18 per cent of the FTC's 600 attorneys leave the commission each year—and two thirds of them for private law firms. Two thirds of those who leave have been there less than three years. At that rate, the agency must hire 100 extra lawyers each year just to keep fully staffed.

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The bold language drafted by the D.C. Bar ethics committee—language imputing a lawyer's disqualification to his entire firm—could bring this interchange to a halt. But proponents of such a broad disqualification standard suffered a serious setback in December, when the committee fell two votes short of the ten needed for the rule's approval.

A tough disqualification rule would also be disastrous for any Washington law firm with a substantial practice before one federal agency. If a firm hired away even one of an agency's lawyers, its partners would risk disqualification, and that would mean a loss of clients. If a firm didn't hire ex-agency lawyers, it might lack anyone with the necessary expertise—or clout—to handle cases before that agency. Again, no clients.

Big firms detected this Catch-22 early, and they have been applying relentless pressure—in a lawyer's gentlemanly way, of course—to scuttle the proposed ethics opinions. "I've never seen anything like it," says Freedman. "It's been astonishing. There has been intensive lobbying on a personal level." Freedman says he knows of two ethics committee members who supported the disqualification rule but who were "feeling so much heat" they were inclined to vote against it. "They acknowledged that they couldn't justify a switch intellectually, but were reacting to the pressure they were getting" from Washington lawyers.

Because those in government and the private bar feel equally threatened by the committee's proposal, they have sometimes joined forces to lobby against it. "A very interesting thing happened," Freedman says. "I had a conversation with Lloyd Cutler [a highly respected Washington lawyer who adamantly opposes the disqualification proposal]. He was trying to persuade me to change my mind, and he said, 'Look, you have a meeting coming up. Could I send a representative to be heard on the issue at that meeting?' I said, 'Okay.'

"So at the next meeting, not one but two representatives of Lloyd Cutler showed up—both from the Justice Department, and one was an assistant attorney general of the United States! *When Lloyd Cutler sends a representative, he sends someone from the Justice Department!* That, it seems to me, illustrates the unwholesome relationship—or interrelationship—between the law firms that represent those who are regulated, and the government agencies that do the regulating."

Cutler, who wields as much power as any Washington lawyer, doesn't dispute the essential elements of Freedman's story, although he denies there was anything improper in what he did (Freedman doesn't allege impropriety). Rex Lee, the assistant attorney general (in charge of Justice's Civil Division) that Freedman spoke of, insisted "the views I hold are mine—I have no personal interest in this thing." And the Justice official who accompained Lee that day called Freedman a "self-appointed vigilante. . . . Who the hell does he think he is?"

What will happen if the ethics committee's disqualification gambit fails? Freedman says, "If the legal ethics committee does not take some responsible position on this—if, for example, the committee were to wash its hands and not meet objections that groups like Common Cause have—the most important next battle is going to be before a committee of Congress. I have had calls from several different committee staff members, expressing concern about the action. Congressional action would trump everything else, and might be the last thing that the opponents want, because that likely would be phrased in criminal terms."

Congress might not be the only interested party. We'll soon have a chance to see whether Jimmy Carter will make good his promise to end the "sweetheart arrangement" (his words) between the regulators and the regulated. ■

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Memo of the Month

Department of State

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ACTION CU-04

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FOR IMV/RUSSELL FROM THE AMBASSADOR

E.O. 11652: N/A
TAGS: SOCL PL
SUBJ: AMBASSADORIAL REPRESENTATIONAL SCREENINGS

1. I HAVE SEEN "THE BAD NEWS BEARS".

2. NO DOUBT THIS PICTURE HAD THEM ALL YOCKING IN BEAUTIFUL DOWNTOWN BURBANK AND THE IMV VIEWING ROOM, BUT I FEAR IT WOULD HAVE OUR AUDIENCE HERE ALTERNATELY YAWNING AND PUKING. (A) NOBODY HERE BUT THE AMERICANS, CANADIANS, AND JAPANESE HAS THE FOGGIEST NOTION OF WHAT BASEBALL IS ALL ABOUT, OR IS INTERESTED ENOUGH IN IT TO SIT THROUGH NINETY MINUTES OF A FILM WHICH MAKES A MOCKERY OF THE GAME, INTERSPERSED WITH DUBIOUS SEXUAL ALLUSIONS INVOLVING SUB-TEENS AND JUNIOR TEENS OF BOTH SEXES, AND FILLED WITH EVERY CLICHE THAT CAN BE MILKED FROM A PLOT-LINE APPARENTLY DEVISED BY SOMEONE WHOSE IMAGINATION IS NOT STRONG ENOUGH TO QUALIFY HIM FOR WORK AS AN HONEST PORNOGRAPHER. (B) NOBODY HERE WOULD THINK IT CUTE THAT CHILDREN OF THIS AGE ARE DEPICTED AS HAVING VOCABULARIES WHICH RARELY RISE ABOVE THE DEFECATORY AND COPULATORY FUNCTIONS. (C) THE REACTION OF POLES HERE WHO KNOW THE AMERICAN MOTION-PICTURE SCENE WOULD BE ONE OF DISGUST.

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PAGE 02 WARSAW 07900 0315482

MINGLED WITH ENVY AT THE PRODIGALITY INVOLVED IN THE WASTE OF SUCH TALENTS AS THOSE OF WALTER MATTHAU AND TATUM O'NEAL. THE LATTER OF WHOM IS A MINOR CULT FIGURE IN POLAND AS A RESULT OF HER PERFORMANCE IN "PAPER MOON".

3. SO FAR AS WARSAW IS CONCERNED, YOU CAN TAKE THIS FILM AND STICK IT BACK IN THE CAN.
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How the Dope Traffic Became Airborne

by George E. Hopkins

Ninety per cent of the American marijuana supply now comes in by air from Mexico, and it has spawned a new breed of dealers. Three of them surfaced recently in Bryan, Texas, home of Texas A & M. They were young—Vietnam veterans—the kind nobody pays much attention to. They said they had just gotten out of the Air Force, and there was no reason to doubt it. Their conversation was sprinkled with references to combat. That sat well with folks in Bryan, a middle-American bastion where the counter-culture never gained a foothold. The place fairly reeks of football and short hair. The A & M student body probably has the country's largest ROTC enrollment. The flag flying over Kyle field for home football games was once described by the PA announcer as having been carried "... by an Aggie alumnus in the cockpit of his Phantom during a raid on Communist Hanoi." Until recently, local Baptist churches kept a fresh coat of paint on a billboard proclaiming: "STRONG MEN SAY 'NO' TO STRONG DRINK." It's not the kind of place where drug dealers advertise themselves with long hair and Indian jewelry.

The trio had come to Bryan because it promised to be an easy mark for their particular speciality—planejacking. They were highly skilled at it, and Bryan was a place where they could blend in with the students, check out the situation, and deflect suspicion by using military language in the casual conversations they struck up in bars. Their expensive clothes—rugby shirts, tailored denims, digital watches—obviously didn't come from the PX, but after all they *were* ex-officers. If they seemed vague about their studies, nobody remembered. But people did remember how they talked constantly about flying, how they hung around the Bryan and College Station air fields, watching, listening, occasionally renting a Cessna 150 for a short hop. They seemed casually interested in part-time jobs, maybe instructing or ferrying planes. "By the way," they invariably asked,

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"know anybody who doesn't use his plane much, might want to rent it?" A normal question, perhaps, from ex-military fliers trying to stay current while waiting for an airline job to open up.

Only after they—and two superbly equipped Piper Cherokees worth over $100,000—disappeared did people suddenly remember that maybe they *had* seemed suspicious, a little too interested in other peoples' airplanes. But it was too late. The Cherokees had become part of the staggering toll of light aircraft stolen for use in the Mexican drug traffic.

Last year 135 aircraft valued at $60 million were stolen nationwide. "An educated guess would be that a majority of aircraft stolen are for the purpose of drug trafficking," says John C. Adams, chief of security for the Federal Aviation Administration's Southwest Region. Light planes are a thief's delight. Door locks are flimsy, ignitions easily hot-wired, and airport security in most places is practically nonexistent. The easy camaraderie of most small airports, whose operators are accustomed to sightseers poking

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about and gawking, makes things simple for planejackers. Many rural airport operators think nothing of actually leaving the keys in an airplane's ignition, particularly if a student has scheduled an early hop. Bryan was no exception. Major crimes were rare, people generally unsuspicious and complacent.

While masquerading as students taking brief beer breaks from their books, the trio found out a lot about the area's flying community. Then they carefully cased the airports. College Station had lighted hangars and a 24-hour guard. It was definitely out.

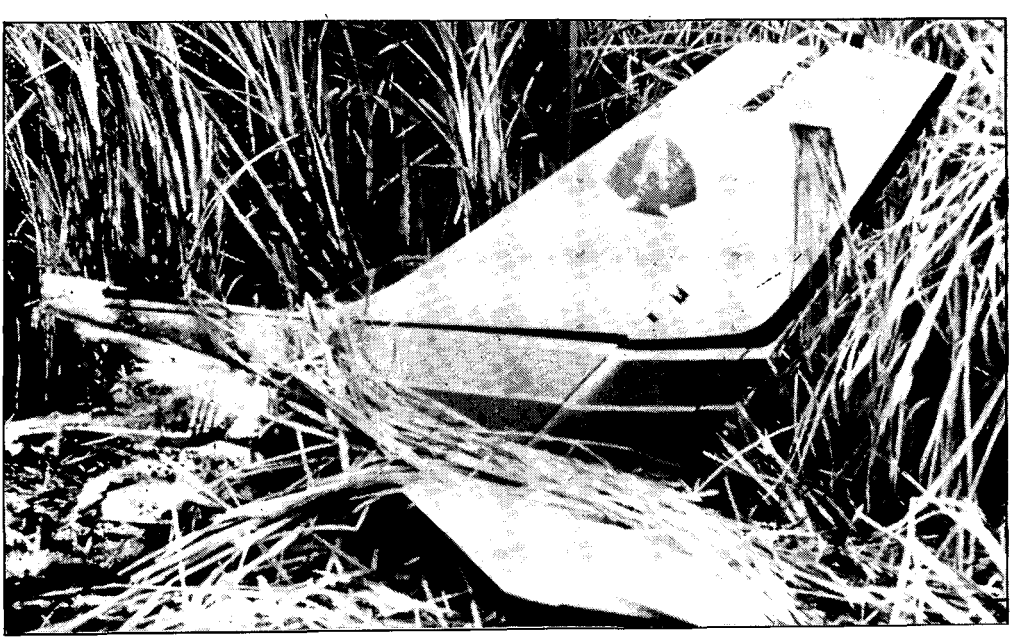
Bryan's Coulter Airport, on the other hand, was poorly lighted and had only open hangars and a single attendant who lived in a trailer several hundred yards from the hangar line. They guessed him to be a sound sleeper.

Pajamas Flapping

Roy Tribby, the caretaker at Coulter field, got Bryan's last look at the airplane thieves. He had been edgy about airport security for a long time, ever since planejacking began to flower along with light plane drug smuggling in the early 1970s. Coulter had escaped loss so far, but Tribby's trailer was too far from the hangar line for him to take real precautions—so mostly he just worried.

Then Dr. John Halbrooks' brand new Cherokee vanished. One night it was there—the next morning it wasn't. The planejacking not only made Tribby angry, it cost him a lot of sleep. It's not easy to sleep while wondering when the next plane will vanish. That's why, barely three weeks later, he awoke with a jolt upon hearing, distantly through the thin aluminum walls of his trailer, an airplane tuning up at high power. Fearing that another planejacking might be in progress, Tribby leaped into his pickup, pajamas flapping, to investigate. Heading for the hangar line across the field, he saw Lilly Ice Cream's company plane taxiing through the fog toward Coulter field's single paved runway.

Tribby pondered cutting across the concrete apron in order to block the runway with his pickup. He wasn't sure that Wally Anderson or Hawley West, two of Lilly's flying executives, weren't in the plane. So when Tribby sped after the light plane scudding over the gravel taxiway, the fear of



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looking foolish was as much on his mind as anything else. He was paid for watching things around Coulter, but he figured confronting planejackers who might be armed was beyond the normal call of duty.

The Cherokee beat Tribby to the runway, turned into the wind, and began rolling without benefit of either engine warm-up or radio clearance, ignoring Tribby's honking and light-flashing. Tribby paralleled the aircraft as it gathered speed, his pickup careening dangerously close to the wingtip. While he was peering through the mist, deciding whether to block the runway and trying to make out the faces in the cockpit, the Cherokee got away from him. Swerving slightly off the runway, bouncing and wobbling, Lilly's airplane struggled off into the low clouds and was gone.

Two of the planejackers (the third remained on the ground and handled details there) were heading for a privately owned dirt strip 20 miles south of Matamoros, Mexico. Once there they would put Lilly's Cherokee to a new kind of work—the nightly hauling of marijuana across the border. Sometimes they would deposit their cargo on remote airstrips. At other times (when making deliveries in the metropolitan areas of Texas), they would dump it at low altitude onto deserted farm-to-market blacktops, where ground contacts would recover the heavy canvas bags.

They had been at it regularly for more than a year. Neither flier was involved in marketing marijuana. They just provided the airplanes and flew it. Both would much rather have had jobs with an airline. But jobs were scarce and Vietnam-trained pilots like themselves were a dime a dozen.

Lilly's plane was admirably suited to their purpose. With its sturdy fixed gear, oversized 300-horsepower engine, and six-passenger capacity, the Cherokee would make a perfect marijuana hauler once its seats were stripped away. The planejackers would ignore routine maintenance, inspections, and tune-ups, running the plane continuously until it was worn out. Then they would abandon it back in the United States, where its owners might recover it. This made them feel better somehow—an assurance to themselves that, after all, they were really only "borrowing" the airplane. If it weren't for the lousy economy and the job crunch, they wouldn't have to do this.

Of course they would have to steal another airplane eventually, but they tried not to think about that. It's easy to put scruples out of your mind when you're making $1,500 a night. Stealing the planes they used was the biggest risk. Neither man intended to get arrested while waiting for the call from an airline personnel office. So they operated only during periods of extremely bad weather, times when ordinary pilots (and most planejackers, for that matter) stayed on the ground.

Once airborne, the smugglers were far too professional to run afoul of the Federal Aviation Administration. Planejacking, if you didn't take any stupid chances, was a real snap. Both men remembered with satisfaction their first job. They noticed that a wealthy oilman's Piper Aztec had a thick coat of dust on the wings, indicating that the plane was rarely flown. Since the plane was kept in a locked, enclosed private hangar, they simply cut the lock, removed the airplane, and replaced the lock with another. The owner didn't miss his airplane until they returned it (abandoning it at another airport), slightly the worse for wear, six months later.

The Vigilant Government

Large affairs, whether of war, politics, diplomacy, or America's contemporary drug culture, have a way of getting down to the grass roots eventually. Both Lilly's Cherokee and the trio of planejackers were part of a much larger matrix. Since 1970, planejacking has become epidemic, increasing some 900 per cent.

Most aviation experts date the

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beginning of large-scale aerial drug smuggling from "Operation Intercept," the Nixon Administration's 1969 attempt to curb Mexican drug smuggling by policing the border. They tried a deliberate slowdown of border customs checks. Before tourists could cross, they had to wait interminably in sweltering heat, despite the assignment of nearly 2,000 additional agents to the border checkpoints. Aside from obliterating the economy of the border towns, Operation Intercept had no impact on the volume of the drug traffic. It did, however, force the border's normal heavy surface traffic in drugs to seek alternative means of delivery. The solution was simple—take to the air.

At about the same time, the Vietnam war, and then its subsequent phase-down, created a vast pool of skilled fliers for whom there was virtually no civil aviation employment. It was an old pattern. The American military has always operated on the principle that it is better to have too many pilots than too few. During our wars it has trained pilots in sufficient numbers to meet the *maximum* estimates of combat losses. Fortunately these losses never materialized, largely because American airmen have usually flown vastly superior aircraft. This has meant that each war generated surplus pilots who had to either barnstorm, take up crop dusting, or become corporate pilots, instructors, or small airport operators if they wanted to stay in aviation. Airline jobs, to which all pilots aspire, have nearly always been scarce.

The only break in this historic pattern of pilot surplus came in the early 1960s. The Navy's experience was typical. During the 1950s the Navy trained only a thousand or so pilots per year, just enough to meet losses due to retirement and attrition (about 300 pilots died on duty annually, mostly in crashes). The Navy could afford to be very selective during these stable, peacetime Eisenhower years, requiring service commitments of more than five years

from pilot trainees (thus discouraging non-career men), perfect eyesight and physical condition, and college degrees. The Navy even began phasing out its longstanding Naval Aviation Cadet program, which had served as an avenue to an officer's commission and gold pilot's wings for thousands of able and ambitious young men who had not finished college, and even for a few who had enlisted directly from high school.

Then in the early 1960s, the arrival of commercial jets revolutionized air travel, creating a quantum jump in the need for pilots. The airlines no longer had available the large pool of skilled military-trained pilots from which they had traditionally drawn their new hires. Between 1964 and 1966, there was such a desperate shortage of airline pilots that some airlines even went so far as to train their own.

Typical Overreaction

The military, which had counted on the small corps of pilots it had trained during the 1950s to serve as the backbone of its career pilot force, suddenly began losing almost all of

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them to far more lucrative and desirable airline cockpits. The Vietnam war further hastened pilots' flight to civilian life, at just the time when the military's own needs began to grow.

As a result, in the late 1960s Pensacola quadrupled its annual output of Navy pilots. It was a typical overreaction, and the Air Force repeated it on a far larger scale. Together, the services produced a tremendous number of pilots who had excellent training, combat experience, and resentment against the system. They found that they could neither stay in the shrunken, professionalized, post-Vietnam military nor find suitable civilian employment.

It was a case of two groups meeting each other's needs. The drug smugglers needed pilots—the pilots needed jobs. There was no way the smugglers could match an ex-military flier's experience and skill—though they tried, usually with disastrous results (each spring, the melted snow reveals new proof in mountainside wreckage). Far better, the smugglers concluded, to contract out the flying part of the operation.

At first the smugglers thought of using surplus military aircraft. They urged the pilots to fly everything from ancient bombers to recently retired airliners. Propeller-driven Super Constellations and DC-4s were plentiful and cheap, costing barely more than their value as scrap. But the trouble with these large aircraft, from the pilots' point of view, was that they were unsafe and easily tracked on radar. They also required well-prepared, fairly large air fields. The pilots wanted to be able to set down on any rough field, particularly in case of engine malfunction. Worn out old civil airliners were tricky to operate. The smugglers thought in terms of infrequent large operations (thus reducing the opportunities for a bust), while the pilots thought in terms of their lives. The smugglers could hardly have cared less about the airplanes—after one trip they preferred to torch them, since they could buy another large, wheezing relic for about the price of the gasoline it took to fly to Central America. The pilots saw it another way. Sure, modern, reliable, light twin-engine planes might cost ten times as much. But the pilots were far more likely to survive ten trips in a $100,000 Aerocommander than one trip in a $10,000 ex-airline transport. "Okay," the smugglers finally agreed, "but you guys supply the airplane."

From this compromise, the threat to owners of expensive light aircraft was born. Lilly Ice Cream Company's Cherokee was one of its victims.

Slipping Past the Border

For the garden-variety light-plane smuggler, marijuana is the staple. California's markets are the most lucrative, but the Texas border is easier to cross. The California border is short, and radar surveillance is tight. The U.S. Air Force, which maintains an Air Defense Identification Zone along the border, has belatedly begun to cooperate with the anti-smuggling effort, making things risky in the Far West. Running the border in Texas is safer, since the rugged terrain along

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much of the Rio Grande defeats radar at low altitudes and heavy legitimate light plane traffic in the lower valley hampers detection. And the narcs are badly outnumbered.

During a five-week period ending in November 1975, the FAA reported 152 "true targets" penetrating the border in the Southwest Region (Texas and New Mexico). A "true target" is a radar-detected, unauthorized border crossing. Most were at night, and while a few may have been innocent enough, the supposition is that they were all smugglers. (There were undoubtedly many more crossings that went undetected by radar.) Although the Drug Enforcement Agency operates its own fleet of anti-smuggling light planes—some of them equipped with such space-age gadgetry as Forward Looking Infrared, designed to track airborne drug runners from the heat of their exhausts—the odds still favor the smugglers. A maximum effort during that period by the DEA, Border Patrol, and Customs Service resulted in only eleven aircraft seizures, 20 arrests, and the confiscation of 8,000 pounds of marijuana. Everybody regards that as a breakthrough.

"There are large desert areas where small planes can fly carrying what they please—that is the truth," Mexican President Luis Echeverria declared in 1975, answering criticism of his government's laxity. A veteran official puts it another way: "A good smart pilot who knows his stuff and keeps his rats killed can beat the hell out of this system." Under "keeping rats killed," he says, the absence of previous criminal connections is most important. Most arrests result from routine police work and the chance suspicion of local lawmen: "Those guys usually get nailed on the ground or not at all. And the best anti-smuggling device around is still those unlighted peaks in northern Mexico."

That's exactly what the Lilly people feared had become of their aircraft. Reports began filtering back to them, through their insurance agency, that a crashed and abandoned Cherokee had been located in northern Tamaulipas, Mexico. Since the wreckage was on private property (a large cattle ranch), it took several weeks before they found out the plane wasn't theirs—it was Dr. Halbrooks'.

The Stake-Out

The two planejackers had blown a tight night landing shortly before, wrinkling the undercarriage so badly that they had to get a replacement—in a hurry. The Mexican side of their operation was furious. The two *yanquis* were under contract, so to speak, and the hard eyes of their Mexican friends made them decidedly nervous. That's why, against their better judgment, they returned to Bryan to get another quick airplane. The Mexicans promised to take Dr. Halbrooks' banged-up airplane to a remote gully and camouflage it so it couldn't be seen from the air—but they didn't do a very good job.

The doctor's wrecked Cherokee attracted the attention of passing pilots, who routinely reported it. Neither Mexican nor U.S. authorities were aware of any recent accidents in that area, so they investigated. What they found looked suspicious. For example, the owner of the cattle ranch denied knowledge of the wreck, and seemed reluctant to permit a ground search.

At this point, a unit of the Mexican National Police, which had been created specifically to humor the Nixon Administration's war on drugs, got into the picture. In a coordinated effort between the Border Patrol and this Mexican Police unit, a careful trap was set. The Border Patrol, with the cooperation of the Air Force and the FAA, began radar monitoring all flights originating from the ranch's private airstrip. They found a high incidence of low-level contacts. By careful computerized tracking they began to get a good idea of the pattern of the ring's operation, includ-

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ing destinations on the American side of the border.

An undercover agent in the U.S. supplied the particulars of the operation, which included cocaine as well as marijuana. All the circumstances looked favorable for a big bust. The lawmen knew the time of takeoff, the amount and kind of drugs on board that night, and where they planned to land in Texas. Everything was set up to catch them red-handed.

Mexican police would wait until the plane took off, and then move in on the ground side of the operation in Mexico. They had helicopters ready for the actual bust, and surveillance by aircraft circling out of earshot, monitoring the Mexican airstrip by infrared tracking devices.

On the American side of this operation, Border Patrol agents, along with their undercover man (who had infiltrated the ring), would nab Lilly's Cherokee and its pilots as soon as they landed. The landing area, a deserted blacktop road where the smugglers had snipped off road signs so they wouldn't interfere with the Cherokee's wingtips, was already staked out.

The Army and the Plane

But it never happened. Things went sour in Mexico. Somehow, nobody knows exactly why, the Mexican Army got into the act prematurely. Shortly before dusk a truckload of privates drove onto the field shooting rifles in the air. Naturally everybody on the Mexican side of the connection fled. The Mexican Army, however, nabbed Lilly's Cherokee, which was sitting on the airstrip already loaded with narcotics. Oddly, the Mexican Army had not been involved in the operation in any way until it disrupted the bust. It looked very suspicious, but no charges were ever brought against either the general or the owner of the ranch. And no case could be made against the American side of the connection, although they were all arrested.

At this point, Lilly nearly got its airplane back. It was its insurance company, not lawmen, that finally notified Lilly that Mexican authorities had recovered the Cherokee. "I started scrambling to find some way to get to Matamoros to fly it home," Lilly's Wally Anderson explains. "But a little later our insurance man called back and told us to forget it—the plane was being flown to Mexico City by the Mexican Air Force. Our insurance company sent a man out to the Mexico City airport to verify the presence of our Cherokee there. We've pulled all the strings we could, but it seems to be no use. In his report, our Mexican insurance agent said that a lot of high people wanted to keep all confiscated planes."

Despite a 1936 Diplomatic Convention calling for the return of stolen vehicles, the Mexicans rarely comply. Private planes are a tremendous status symbol in Mexico. Mexicans are currently holding 188 American-owned aircraft, mostly stolen by drug smugglers. The U.S. embassy keeps a "List of U.S. Registered Aircraft Known To Be In Mexico," and it has some strange entries like: "35590—In possession of Mr. Gaston Santos (Occupation Unknown)." Lilly's Cherokee now serves the bureaucrats of the Mexican Secretariat of Health, Education, and Welfare.

The fate of the three planejackers is not entirely clear. One of the two who flew the Lilly plane was later arrested on an unrelated charge and confessed his role in the Bryan thefts. The other pilot and the ground man may have been caught for some later offense, or they may be still flying marijuana today. If they're not, people like them certainly are, and the stolen-plane smuggling traffic seems unlikely to stop. Much of the way it is now conducted is the fault of government ineptitude, of course, and that presumably can be reversed. But even if the government begins to stem the supply of desperate, unemployed pilots it created, it can't do much about the demands for their services. ■

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Waste: The Real Problem With the Alaska Pipeline The Alaska Pipeline

by Peter Gruenstein

No one ever said building the Alaska Pipeline was going to be easy. Winding its way over hundreds of miles of permafrost, across scores of rivers and streams, around tundra, through volatile earthquake zones, and up and down some of God's most spectacular mountains, it is a gargantuan engineering challenge.

And no one ever said the pipeline was going to be cheap. With over 800 miles of 48-inch pipe, more than 20,000 workers earning up to $19 an hour for 70-hour weeks, intricate environmental stipulations, and one of the world's least hospitable climates, it is a management nightmare of such proportions that to note that it is the most expensive private project in history is still to understate its complexity.

So it should come as no surprise that officials of the Alyeska Pipeline Service Co., the consortium of eight oil companies building the pipeline, are crowing that the pipeline is the eighth wonder of the world or that they are publicly delighted with the virtual completion of the pipeline this fall, making it nearly certain that the oil will begin flowing from Prudhoe Bay to Valdez on schedule, in mid-1977.

What does come as a surprise, however, is that Alyeska executives claim, despite a series of cost estimates that have skyrocketed from $1.5 billion to $9 billion, that the pipeline has been constructed efficiently, with little waste or theft. Alyeska president Edward Patton says, "The last time we attempted to quantify it, we had less than a half-million dollars lost on the whole project. . . . I'm satisfied it's more difficult to steal from this project than ordinary construction projects, and our loss ratio is probably something less than one-tenth of a per cent, whereas for a building in Washington, D.C. the loss rate may be as high as 15 per cent." Arco President Thornton F. Bradshaw calls the North Slope venture "big business at its best—enterprising, courageous, and, above all, successful." In retrospect, there is little Alyeska would do differently to control costs if pipeline construction were starting over again.

Patton's and Bradshaw's assessment of the efficiency of pipeline construction bears close scrutiny. For if they are right, the pipeline provides the most convincing evidence the

Peter Gruenstein is a Washington writer, currently working on a book about Alaska.
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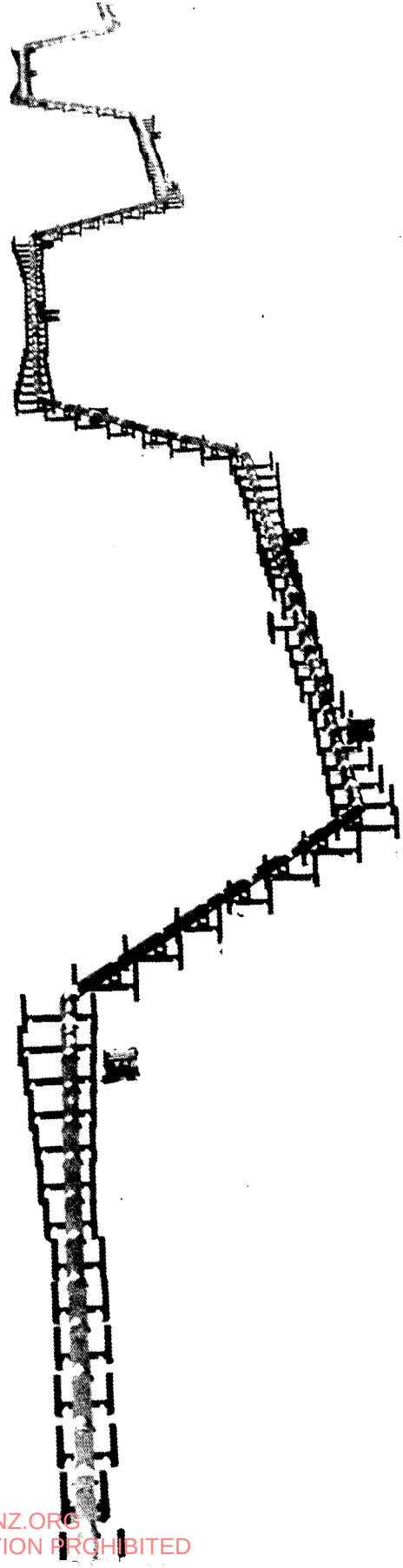
major oil companies have yet amassed that bigness is not badness—that firms with huge technical and capital resources are necessary to the discovery, transportation, and production of the massive amounts of energy required by this country; that the oil industry is not oligopolic. But if they are wrong, and the pipeline has been built with little regard for cost or waste, it brings into serious question whether the major oil companies possess the one characteristic critical to achieving legitimacy in a free enterprise system: the incentive to produce goods or provide services at their lowest possible cost. And if they are wrong, it gives powerful ammunition to critics of the oil industry who maintain that the majors have become so mammoth, so interlocked with each other, and so tied to the world economy that they do not respond to the normal cost-price incentives that competitive businesses respond to, and thus do not adequately serve the public interest.

The evidence is clear that Patton's assessment of the cost-management aspect of the pipeline is inaccurate. Theft has been widespread, at times uncontrolled; the work force grossly inefficient; and mismanagement the rule. There have been, as will be seen



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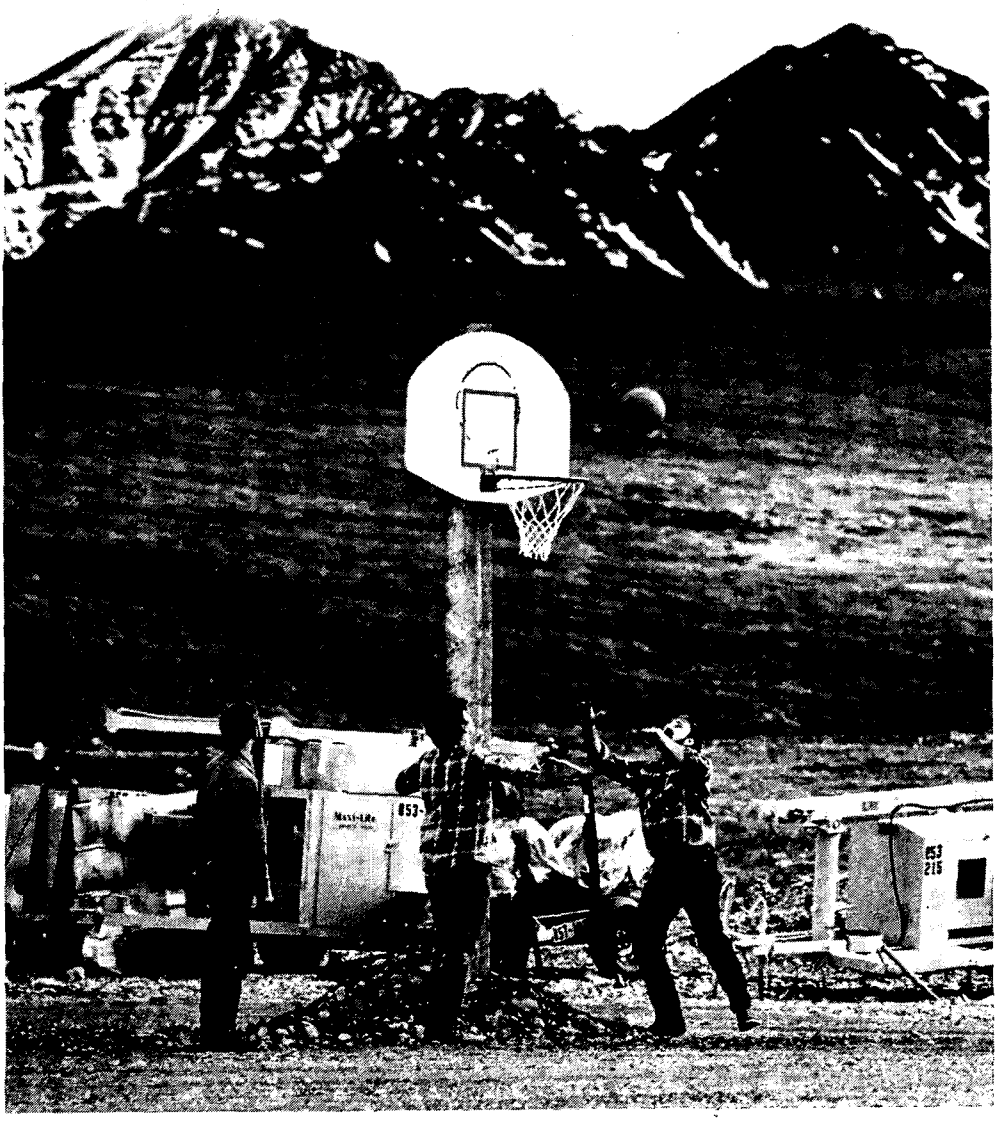

later, compelling incentives to build the line quickly and equally compelling incentives not to worry about costs.

"The amount of theft has been tremendous," says Richard Fineberg, a Fairbanks-based reporter who has probably written more extensively on the pipeline than anyone else. Thievery was particularly pervasive in the first 18 months of pipeline construction, which began in the spring of 1974.

"There was a massive lack of security. The individual workman was just picking up and walking off with the job," says Mike Bradner, Speaker of Alaska's House of Representatives. "Their records were so screwed up they had a hard time determining what had been ripped off."

The cavalier attitude toward costs displayed by Alyeska, its five prime contractors, and a host of subcontractors has allowed pipeline workers to employ a rather elaborate rationalization to justify the thefts. "On cost-plus contracts," notes one long-time pipeline worker, "the more money you spend, the more money you

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make. They want to get ripped off." This worker admits to having stolen a 12-ton hydraulic jack, four-and-a-half-by-six-inch pieces of oak—"they just leave them on the side of the right-of-way"—mosquito nets, gloves, sleeping bags, a generator, a First Aid kit, and stainless steel that he used to make various kinds of "pipeline jewelry" on the job. "You've got to do something with your time," he explains.

Perfectly Good Plywood

I heard so many workers try to justify the stealing that I began searching for someone who didn't. I finally found a woman truck driver who didn't, or at least I thought so at first.

"I think this ripping off is really wrong," she said with some passion. "People think it's O.K. to steal from a big company, but they forget that it was once a small company. And what they don't realize is that they're paying for it, that that sort of thing causes prices to rise for everyone. It's amazing the intricate rationalizations they use to justify the theft. And if you're around that sort of attitude long enough, you're very susceptible to getting sucked in yourself."

I told her that one of the most interesting rationalizations I had heard was that if workers didn't steal something, Alyeska would destroy it. "Well, you know," she responded after some thought, "that *is* right. We live in a cabin that a carpenter built with perfectly good plywood that Alyeska was going to destroy. He would just pick up a little piece here and a little piece there. Our whole house was built by Alyeska.

"I don't see anything wrong with that, though. They would burn perfectly good plywood all the time."

For the first year-and-a-half of the project, in many cases, the oil consortium did not employ inventory and security measures that a small businessman would have installed. Basic controls, such as I.D.s and authorization signatures, were not used. Large warehouses and other storage areas were often unfenced and unguarded, and when guards were present they were frequently more a part of the problem than of the solution.

According to Larry Carpenter, an Alyeska public relations executive in Fairbanks, the pipeline's first security chief, Mel Personnett, "found there was great resentment [among top Alyeska officers] towards strict security. He didn't like what people were getting away with. . . . He said if you won't let me run it my way, I'll go." He went. Shortly after leaving in September 1975, Personnett complained, "I've got bumps all over my head from running into brick walls."

Personnett was replaced by Robert Sundberg, a former Fairbanks police chief. A friendly and open man, Sundberg also paints a very different picture from Patton's. "Paperwork was a relatively loose procedure for a while, no doubt about that," he noted. Of the woman Teamster's story that her cabin had been built with Alyeska plywood, he said, "I would say in all probability it's true." After relating stories that I had heard about duplicate and unauthorized purchasing, he responded, "It's very probable they were buying the way you said it." He pointed out that items worth less than $500 have not been inventoried.

When the project first began—and to some degree still—Alyeska officials were worried that security and inventory measures would slow down construction of the pipeline. Above all, they wanted labor peace; they didn't want to risk the ire of workers by subjecting them to such measures as baggage inspection. And if they were willing to pay workers as much as $70,000 a year for a couple of hours of real work a day, they were not going to worry too much about some thefts and duplicate orders. But the Personnett resignation and the dozens of stories of theft and waste that were circulating by word of mouth became intolerably embarrassing, and when Sundberg was hired he was told he would be given at least some freedom

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to do his job.

For example, Alyeska had set up a special mail service to and from the isolated construction camps. About 50,000 pounds just in packages were being handled by the special mail service each week and this had become one favorite means of getting stolen items safely out of the camps. Sundberg took the simple step of requiring that all packages leaving the camps be sealed in the presence of a security guard. The quantity of outgoing shipments, he reports, dropped by 75 per cent, which gives some idea of the severity of the theft problem.

But the theft mentality among workers became so deeply etched during the initial stages of pipeline construction that, despite tighter security measures and increases in the number of security guards, stealing has remained widespread. Workers have merely become more inventive.

Sundberg relates one recent incident when a guard spotted a yellow stick hammered in the ground beyond the gate where he was stationed. For some reason the guard became suspicious and started digging where the stick was marked. He uncovered a $2,000 hydraulic ram jack used for lifting equipment weighing up to 150 tons.

A Paycheck For Doing Nothing

But if Alyeska has done a poor job of controlling the theft problem it has performed even worse in managing its most important single cost component: labor. As one former pipeline worker puts it: "The biggest rip-off is doing no work." Brian Rogers, a researcher for the state legislature, says he has "lots of friends who quit Alyeska because it was too hard looking like you're working when you're not." A conservative Democrat running for the state legislature, someone not unsympathetic to the oil industry, began one of his television ads: "How many pipeline workers have you heard complain about getting a pay check for doing nothing?"

One former pipeliner's younger brother, who works at one of the pipeline camps as a pipe fitter, visited him in Fairbanks in late August. The younger brother brought with him one of his most prized possessions—an elaborate, stainless steel hashish pipe he made on the job. He says he spends most of his 70-hour weeks making pipeline jewelry—belt buckles, rings, and maps of the pipeline made out of the pipe that are sold to tourists for as much as $75—and goofing off.

Mike Bradner also worries about his younger brother, Terry, a personable and quick-witted 20-year-old who works on the pipeline at Prudhoe Bay. Terry's primary responsibility is to pump gas, which takes up one or two hours of his 12-hour days. Much of the rest of the time he spends in a little heated shack reading, especially the porn magazines that are available in profuse array at the camp's commissary. Last year Terry paid $20,000 in federal income taxes. He grosses up to $1,200 a week.

As late as the end of 1974—after the first construction season—Alyeska estimated that peak employment on the line would hit 15,600 workers in 1975, dropping to 12,000 this year. But labor productivity has continued to fall far below even these revised estimates; the Alyeska solution has been to throw in more manpower. In 1975 the number of pipeline employees was 21,600; in 1976 it also topped 21,000. At a conservative estimate of $75,000 per man-year—including pay, food, lodging and equipment—that's an additional $1 billion in costs right there.

Overlaying the theft and labor problems has been a top-heavy isolated management (the top brass in Alyeska and the owner oil companies are based in cosmopolitan Anchorage, hundreds of miles from pipeline operations, rather than in frigid, dreary Fairbanks) that has been slow to identify inefficiencies and even slower to take remedial steps.

In December 1974, for example, Alyeska's chief of construction, Frank

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Moolin, wrote a letter to the Alaska general manager of Bechtel, the huge California-based construction firm which Alyeska had hired to manage the building of the line (and later demoted to quality control assurance). In the letter, Moolin complained that:

"The resources that can be dedicated to this project, as for any project, are limited. Unfortunately, an attitude of 'gold plating' has evolved. This attitude exists within both the Alyeska and Bechtel organizations and came about because of environmental and quality control demands, and because of the weather, terrain and location. This attitude manifests itself in 'slugging' the project with people, facilities, equipment, etc. . . . The aura of 'only the best and the most is good enough' must be dispelled by Alyeska and Bechtel management. . . . If the 'gold plating' attitude is not wiped out. . . WE WILL NEVER BE ABLE to exercise cost control. It will get away from us and be too late." (Emphasis in original.)

Two months later, Moolin wrote another letter to Bechtel in which he pointedly noted that many of the major contractors were submitting invoices "many months after the fact (if at all) and when they do submit them, they are incomplete, inacccurate or not even cost-coded. . . . You will recall the debacle we had at the end of 1974 when we were faced with several hundred million dollars of uncoded invoices. . . . We must get on top of this."

Another manifestation of this gold-plating approach was food. During the first months of construction, steak and lobster were on the menu every night at the camps, many of which boasted first-rate pastry chefs. Workers going out into the field during the day were allowed to take

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'Everybody's just laughing and joking and jamming things into their pocket.'

The stories of pipeline waste and theft told by more than 50 pipeline workers interviewed in Fairbanks, Prudhoe Bay, the Chandalar Camp in the Brooks Range, and Anchorage were strikingly similar. The interviews were also unusual in that many workers readily admitted to having been involved in the theft themselves. One reasonably typical discussion with three pipeline employees in Fairbanks provides insight into both the management of pipeline construction and the attitudes of many of the workers.

Bob: A bunch of us were up in the pipeyard. My official duty was garbage trucks; I hauled out the garbage.

Carl: We hauled out the garbage, all right.

Steve: When the Teamster trucks were loaded with this best-in-the-world insulation, they would just drive their truck to wherever they wanted the insulation and unload it there. That's the way the professional guys did it, with official Teamster trucks loaded with insulation. And they go right out the front gate looking like everybody, just truck after truck after truck.

Reporter: Isn't there someone there telling them not to do it?

Steve: Oh, no, that's the idea. All the trucks are hauling insulation off to the pipeline. But some of the trucks didn't make it to the pipeline.

Reporter: But one would assume the normal procedure would be: 'Okay, Smith, go to gate No. 2, pick up X number of bales of insulation, and go up to camp No. 16 by 1 p. m.' And if he didn't do it, it would be pretty easy to find out that he didn't.

Steve: Yeah, except that you have to keep in mind the attitude of everybody is: 'Gee, we live here and all the pipeline-related shit, that's the occupation forces, and they're fair game.' So everybody from the dispatcher to the chief of the yard to the truck driver to the guy guarding the gate, everybody knows that truck was not going where it was supposed to, and they just lose the paper. By that time, five truckloads have been re-routed elsewhere, and all the people involved have got their truckload of insulation out of the deal. So everybody's happy.

Steve: The fools were just writing out orders as fast as they could. There were lots of bogus purchase orders. People come in and say, 'I'm from Alyeska and I need all of your widgets.' And people give them all their widgets and suddenly find out they weren't from Alyeska.

Bob: I was working in Isabel [a pipeline camp south of Fairbanks], and I have a Ford truck. Of course, you just go over and ask one of your buddies: 'Say, hey, my rear end is kind of sounding bad here,' and he says, 'O.K., I'll get you a new whatever-you-need.'

Carl: People didn't have that

virtually unlimited quantities of raw steak with them to barbecue for lunch. When Alyeska tried to terminate this privilege in the summer of 1974, a group of 30 welders at Tonsina Camp, south of Fairbanks, busted up $3,000 worth of equipment in the camp mess.

Another example of slugging was reported by the tiny *All Alaska Weekly* in Fairbanks, which discovered that Alyeska had spent $10 million on 12 Radmark machines to backfill buried portions of the pipe-

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much to do so that kind of thing would be real easy.

Bob: Everybody's just laughing and joking and jamming things into their pocket. And the rationale [is]: I ain't got no stock in this company, go ahead. I'd go there and I'd say, 'Well, I need a battery.' I live in the bush out here and a battery, you know, you can run a stereo, house lights. . . .

Carl: They brought out all these batteries, just filled them with water and stacked them up. Of course, in two or three days they all froze, just a pile of useless material.

Steve: See, this is what fostered the whole attitude of ripping things off. They were so incredibly wasteful because they were stupid. They didn't understand you take a battery outside and it's 50 below and it freezes and the end pops open. So here's $15,000 worth of batteries destroyed.

Reporter: But why didn't someone tell them?

Steve: Nobody knows; they're all from Texas. If here you come walking by, here's some guy, he's from Texas, he's stacking all the batteries outside, and you say: 'Hey, put them back because they'll freeze.' But if you're 20 minutes too late, they've frozen. And there are so many things like that that happen. . . . So the attitude is, if we don't steal the stuff and save it, Alyeska is going to destroy it.

You have a whole bunch of stuff coming up in packing crates [that are constructed] with perfect sheets of plywood. They throw it out and burn it, so you want to get it before they burn it. That's the attitude. They were destroying it, so we decided to see if we could salvage some of it. It was legitimate salvage too; they just didn't understand what was going on.

Bob: [To steal trucks] you just pick up keys—all the paper work is just sitting there in the envelope [on the seat]—and you just drive the truck off.

Reporter: Do you personally know guys. . . .

Bob: Oh, yeah—I'm covered, right?—I personally know trucks driving around, two that are official 1975 [Alyeska] 4-wheel drive trucks with an old pick-up body stuck on it.

Carl: I was offered tires once at $5.00 each.

Reporter: A little fencing operation?

Carl: Not even fencing, it was just sort of to compensate him for his expenses. I'm sure it would be legally called fencing, but it wasn't like he was making a whole lot of profit off it. It was just more tires than he could use.

Steve: You've got a big bureaucracy [in Alyeska]. Half the people are new in the state and don't care. They're ripping off the state basically, ripping off our jobs. The other half are folks from the state who think that Alyeska is ripping off the state by destroying the kind of lifestyle we have here. So that kind of attitude prevails.

line. The machines turned out to be the wrong kind, were never used, and have sat idle.

But how inefficient can we be, Alyeska executives assert. After all, the pipeline will be ready on schedule in mid-1977. But that's the very point, critics respond. Alyeska is willing to pay almost any price—even a 600-percent cost overrun that would make the Pentagon blush—to begin pumping some of the billions of barrels of oil cradled beneath the frozen Prudhoe Bay tundra as soon as

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possible.

One of the most important and elusive questions is why Alyeska is willing to pay that price to get the Prudhoe Bay oil to market as soon as possible. The question is even more intriguing in light of the fact that the oil companies admit they have little idea what they are going to do with about one-half of the initial production of 1.2-million barrels a day (which eventually will increase to a peak of two million). Oil executives now concede they were wrong when they told Congress in 1972 that the West Coast would be able to absorb all the oil from an Alaska route. And Congress, through legislation, has apparently foreclosed the option of shipping the surplus oil to the lucrative Japanese market.

A major part of the explanation is that two of the three largest owners of the Prudhoe Bay reserve—BP and Sohio—have become inseparably linked. BP is a huge multinational with large world-wide reserves but it has been looking for ways to expand its marketing potential in the U. S. Sohio is a debt-ridden, relatively small company that owns little crude but whose strength is in marketing. The two have agreed that, in return for Prudhoe Bay oil, BP will get a share in Sohio. Not only does that share climb from 26 per cent to 54 per cent as Prudhoe Bay production edges up to about 1.2-million barrels a day, but for BP to comply with the terms of the takeover, the 1.2-million level must be achieved by the end of 1977.

When the pipeline is completed, Alyeska will file a tariff with the Interstate Commerce Commission, which has already begun an informal audit. The requested tariff (the ICC rarely rejects tariffs) will be based on the pipeline's cost—including waste—and a "reasonable return on investment," which is defined by the ICC as eight per cent. While the rate of profit remains the same regardless of cost, the higher the price tag, the greater the profits in dollars. And naturally, the owners of the Prudhoe Bay oil are also the pipeline owners, with one exception. The State of Alaska in effect owns 20 per cent—12.5 per cent in royalties and a severance tax of about 7.5 per cent—of the field but nothing of Alyeska. It will have to pay its partners' rates to ship its one-fifth share to market.

Cost-Plus

So Cost-Plus, Phase One, is that the oil companies will make a sizable, guaranteed profit for transporting their own oil. An added twist is that they will try to transfer as much of the costs of the entire project onto the pipeline in order to sock it to their junior Prudhoe Bay partner, the State of Alaska. A second wrinkle is that, thanks to the Nixon Administration and a compliant Congress, the oil firms can avail themselves of a ten per cent investment tax credit (not a deduction, mind you, but a dollar for dollar credit against taxes owed) on the billions they've poured into the pipeline. And Sohio and the other seven companies can still deduct the interest payments on the billions they have borrowed to finance the line.

Cost-Plus, Phase Two, is the actual marketing of the oil. The legislatively authorized base price for "new" oil is $11.28 per barrel, plus inflation. Arctic and other hard-to-get-at oil is also entitled to an additional three per cent. More importantly, Congress gave the Federal Energy Administration authority to set a special price, subject to a congressional veto within 15 days, for Alaskan oil. The FEA, a friend of the oil industry, will presumably base that price on the total "costs" of bringing the oil to market—including the profit the oil companies are paying themselves to use the pipeline—plus a reasonable profit on the sale of the oil. And, once again, the higher the costs, the greater the dollar profits.

It pays to be an oil company. ■

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political book notes

Public affairs books to be published in January

America's Moment: 1918–American Diplomacy at the End of World War I. Arthur Walworth. Norton, $14.95.

Assassination in America. James McKinley. Harper & Row, $10.

The Average Man Strikes Back. David Hapgood. Doubleday, $7.95. An excerpt appeared in the Special Health Section of the October issue of *The Washington Monthly*.

Blye, Private Eye: The Real World of the Private Detective. Nicholas Pileggi. Playboy, $8.95.

The Control of Oil. John M. Blair. Pantheon, $15.

Critical Mass: Nuclear Power, the Alternative to Energy Famine. Jacque Srouji. Aurora, $10.95.

Crooked Paths: Reflections on Socialism, Conservatism, and the Welfare State. Peter Clecak. Harper & Row, $10. A worthy but dull attempt to explore the conservative caveats that should guide liberalism and socialism.

Crusaders, Criminals, Crazies: Terror and Terrorism in Our Time. Frederick J. Hacker, M.D. Norton, $9.95. An important book about the growth industry of the seventies –terrorism. The author may not be tough enough, but he's extremely thoughtful and well worth your attention.

Everything In Its Path. Kai T. Erikson. Simon and Schuster, $8.95.

The Fall of Public Man. Richard Sennett. Knopf, $15. The co-author of the excellent *Hidden Injuries of Class* has written a book about the narcissism of our time that consistently borders on the brilliant. Every page is good enough to make you think devastating insights are on their way. Unfortunately they never arrive. Sennett may need a demanding editor to challenge him to produce on his promise. Or he may simply need to return to the case studies of the class book that grounded in reality the abstractions that here multiply unsullied by example.

The Game of Disarmament. Alva Myrdal. Pantheon, $15. Why the United States and Russia have done so little to control the arms race. The author oversimplifies the American part of the story, but her book is disturbing nonetheless.

The Gamesman: The New Corporate Leaders. Michael Maccoby. Simon & Schuster, $7.95. Michael Maccoby is a psychoanalyst who, on his return from studying a Mexican village, decided to interview managers of new technological corporations. He brought his anthropological, visitor-to-a-strange-world approach pretty intact to big business, and has described a particular culture with great interest and detachment and practically no academic anti-business animus.

The corporate/technological companies Maccoby describes are peopled by four personality types: craftsmen, who get an old-style pleasure from plying their trade well; jungle fighters, who spend their time arranging their own Darwinian rise; company men, who are loyal, unimaginative, and security-seeking; and gamesmen, the dominant new type, who love challenge and change. The theory is that the famous bureaucratic Organization Man of the 50s has been replaced by a more aggressive, competitive successor–which sounds good, but behind his aura of success the gamesman is often personally unhappy.

Maccoby has made a convincing case, but one wonders how dominant his gamesmen

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Each year The Washington Monthly recognizes the best book on politics and government published during the previous year.

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really are. The companies he studied are products of the 1960s and are not the dominant institutions in American business. Still, the urge to revise the picture of American business as staid and immobile is a noble and necessary one; it is a world that is obviously more dynamic than the critics of the 50s would have had us believe.

Housing by People: Toward Autonomy in Building Environments. John Turner. Pantheon, $10/$3.95.

I Should Have Died. Philip Deane. Atheneum, $7.95.

Ideology and Utopia in the U.S. 1956-1976. Irving Louis Horowitz. Oxford, $19.95/$5.95. A collection of perceptive essays by the editor of *Society*.

The Legacy of Malthus: The Social Costs of the New Scientific Racism. Allan Chase. Knopf, $17.95.

The Luparelli Tapes: The True Story of the Mafia Hitman Who Contracted to Kill Both Joey Gallo and His Own Wife. Paul S. Meskil. Playboy Press, $8.95.

The Mind of the Organization. Ben Heirs, Gordon Pehrson. Harper & Row, $8.95.

Model or Ally?: The Communist Powers and the Developing Countries. Richard Lowenthal. Oxford, $12.95.

Money, Ego, Power: A Manual for Would-Be Wheeler-Dealers. Martin and Duane Ackerman. Playboy, $8.95.

The Murderers. Emanuel Tanay, M.D. Bobbs-Merrill, $8.95.

The Pleasant Avenue Connection. David Durk, Ira Silverman, Arlene Durk. Harper & Row, $8.95.

The Rights of Students. ACLU. Avon, $1.50.

Roosevelt's Revolution. Rexford G. Tugwell. Macmillan, $14.95. An interesting account of the first year of the Roosevelt Administration by one of its brighter architects, who does no more than a human amount of special pleading for his own causes.

The Superfluous Men: Conservative Critics of American Culture. Robert M. Crunden, ed. Univ. of Texas, $14.95.

They Call It Justice: Command Influence and the Court-Martial System. Luther C. West. Viking, $10. Twenty years a lawyer in the U.S. Army, West is dubious about the quality of justice in the military. He traces the history of court-martial proceedings

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from their beginning, and, drawing frequently on his own experience, concludes that a fair trial is near-impossible in the Army's just-follow-orders atmosphere. Trials are a fundamentally democratic process, and the military is fundamentally authoritarian.

It's not news, of course, that justice doesn't flourish in an authoritarian climate, or that the U.S. Army in particular is not an oasis of jurisprudence. This is a book that's right, but neither new nor well-put-together enough to generate much enthusiasm.

Toward a Human World Order: (Beyond the National Security Straightjacket). Gerald and Patricia Mische. Paulist Press, $9.95/$2.95.

The Unkindest Cut: Life in the Backrooms of Medicine. Marcia Millman. Morrow, $9.95. A surprisingly readable sociological study of American hospitals, of what is said and done in operating rooms and in mortality review conferences. The author is particularly skillful in telling how doctors justify or ignore their errors. Her book is not comforting.

Vendetta: A True Story of the Worst Lynching in America, the Mass Murder of Italian-Americans in New Orleans in 1891, the Vicious Motivations Behind It, and the Tragic Repercussions That Linger to This Day. Richard Gambino. Doubleday, $7.95.

Wanted! The Search for Nazis in America. Howard Blum Quadrangle/New York Times. $8.95.

The White House Mystique. Wallace Henley. Pillar Books, $1.50.

Winners and Losers: Battles, Retreats, Gains, Losses and Ruins from a Long War. Gloria Emerson. Random House, $10.95. As a *New York Times* correspondent in Vietnam, Gloria Emerson obviously built up a huge head of emotional steam about the horrors of the war itself and its consequences, and this book is her attempt to channel and deal with some of that emotion. It's a rambling, often quite powerful series of vignettes, flashing back and forth in time, generally grouped around the theme of the war's effects on people here and in Vietnam. One finishes the book genuinely angry and bitter about what America did in Southeast Asia, but feeling also that the world cannot be as morally simple as Emerson portrays it. The anti-war people here are all flawless saints and the pro-war unredeemable villains—a world that, in its purity, is eerily reminiscent of John Foster Dulles'.

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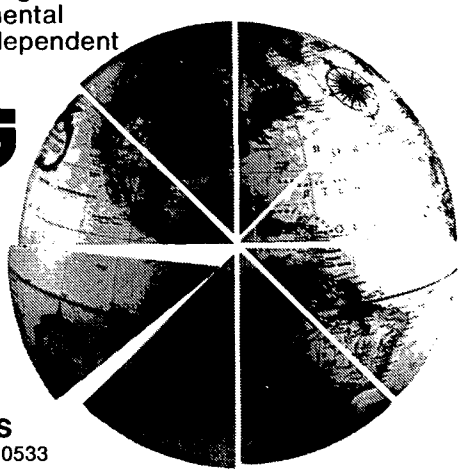

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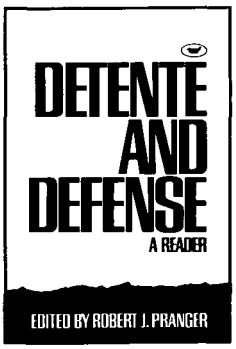

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